85-444

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985
National Freight, Inc., RJG Cab Co., Inc., & Geraldine H. Sweeney
Intervenors-Petitioner,
vs.
Exxon Corporation,
Defendant-Respondent,
and
United States of America,
Plaintiff-Respondent.

NATIONAL FREIGHT, INC.,
RJG CAB INC., and
GERALDINE H. SWEENEY,
Intervenor-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Philip P. Kalodner*
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

Attorney for Intervenor-Petitioners
National Freight, Inc.,
RJG Cab, Inc., and
Geraldine H. Sweeney

DATED: September 13, 1985

* *Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

The Temporary Emergency Court of Appeals affirmed a district court decision (i) determining that Exxon Corporation had overcharged $1.6 billion by miscertifying crude oil in violation of regulations promulgated pursuant to the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748, and as incorporated in the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627, 633.

Without affording an opportunity to those claiming injury by virtue of the overcharges, the District Court determined to distribute the ordered refund to the States of the United States for five federal programs, the principal, and practically exclusive beneficiaries of which are poor persons. In doing so, the District Court "used as guidance certain principles adopted by Congress in the Warner Amendment, §155, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982) directing the disbursement of unclaimed petroleum violation escrow funds," TECA noted in affirming on the basis that such determination by the District Court was within the proper exercise of its discretion.

Petitioners are a trucking company (National Freight, Inc.), a taxicab company (RJG Cab Inc.), and an individual motorist (Geraldine H. Sweeney). They seek to represent the surface transportation end users of approximately 45% of the oil products consumed in the United States. They seek certiorari solely on the issue of remedy. The questions presented are:

1. Whether the end users of more than 45% of the oil products consumed in the United States were unconstitutionally denied their property for public use without compensation, where:

(a) the Court held that the crude oil overcharges had been passed through to them, and

(b) the restitution funds were ordered disbursed to the States for five federal programs, principally and practically exclusively benefitting the poor.

2. Whether a court charged with the statutory duty to make restitution of crude oil overcharge funds to those injured may properly and constitutionally defer to a Congressional determination which is motivated by, and accomplishes, an expressed intent to assist the poor in payment of natural gas heating bills.

3. Whether end users of oil products were denied the procedural due process right to claim against a fund collected under a statute which mandated restitution, where:

(a) the Court held that they had a property right in the funds and were entitled to intervene as a matter of right, and

(b) the Court denied their right to participate as intervenors, first by denying them participation until after it had selected a remedy which would deny them the right to make claims, and thereafter, by limiting their intervention right to the right to appeal.

PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals in the United States as required by Supreme Court Rule 21.1(b):

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

STATES OF ALABAMA, ARKANSAS, CALIFORNIA, et al.,
Intervenor-Appellees,

EXXON CORPORATION,
Defendant-Appellant; (TECA DC-93)

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,
Intervenor-Appellants; (TECA DC-91)

GLADIEUX REFINERY, INC. and U.S. OIL AND REFINING COMPANY,
Intervenor-Appellants; (TECA DC-92)

INDICATED REFINERS,
Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc.,
Intervenor-Appellants; (TECA DC-94)

GASOLINE RETAILERS,
Luther Griffin, t/a Palmer Highway Exxon, Edward McGovern, t/a Maple Avenue Exxon, Anthony Monaco, t/a Milltown Exxon Servicenter, Inc., Donald E. Skilling, t/a Edon Service Corp., Tex Shipley, t/a Shipley's Standard Service,
Intervenor-Appellants; (TECA DC-95)

TOSCO CORPORATION,
Intervenor-Appellant; (TECA DC-96)

PHILADELPHIA ELECTRIC COMPANY,
Intervenor-Appellant; (TECA DC-97)

AIR TRANSPORT ASSOCIATION OF AMERICA,
Intervenor-Appellant; (TECA DC-98)

GERALDINE H. SWEENEY, RJG CAB INC., and NATIONAL FREIGHT, INC.,
Intervenor-Appellants; (TECA DC-99)

MARATHON PETROLEUM COMPANY, MOBIL OIL CORPORATION, and MURPHY OIL CORPORATION,
Intervenor-Appellants. (TECA DC-100)

There are no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates of either RJG Cab Inc. or National Freight, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. The *Exxon* Decision is Having an Unsettling Effect on the Relationship Between the Congress and the Judiciary in the Disbursement of Crude Oil Overcharge Funds: It Threatens a Usurpation of Judicial Authority by the Executive and the Legislature	11
II. The District Court's Decision to Abandon a Restitution Effort Mandated by Statute in Favor of Assisting the Poor is Inconsistent with Decisions of this Court and the Circuits, Constitutes a Taking of the Property of Petitioners for Public Use Without Compensation in Violation of the Constitution, and Creates a Dangerous Precedent of Permitting Social Legislation By the Court	16
III. The Court's Decision to Defer to Congress in Determining How to do Equity is Inconsistent With Decisions of this Court With Regard to the Constitutionally Mandated Separation of Powers and Creates a Dangerous Precedent Encouraging Congressional Interference With the Courts	21

TABLE OF CONTENTS—*(Continued)*

Page

IV. The Court's Denial of the Right to Participate to Those Who it Specifically Found Had Been Injured and Deprived of Their Property and Who It Declared to Be Intervenors of Right Denied Them Procedural Due Process and Creates a Dangerous Precedent Permitting Effective Denial of Intervention of Right. 22

CONCLUSION. 27

APPENDIX A to G

For Appendix A through G, Petitioners Rely on the Appendix Submitted in Connection with the Petition of the National Oil Jobbers' Council and the Jobbers Group, Independent Gasoline Retailers and Air Transport Association of America, Which Contains an Index

APPENDIX H

Statement of Restitutionary Policy of the Department of Energy. B-1

Office of Hearings and Appeals: Order Implementing Departmental Policy Regarding Crude Oil Overcharges B-11

APPENDIX I

Motion for Modification of Remedy by DOE in United States v. Sutton 82-C-1069-B, ND.Okla, and Memorandum in Support with Attached Proposed Legislation B-13

TABLE OF AUTHORITIES

Cases: Page

Arnett v. Kennedy, 416 U.S. 134 (1974)..... 24

Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102 (1974)..... 19

Buckley v. Valeo, 424 U.S. 1 (1976) 21

Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980) *aff'd sub nom. INS. v. Chadha*, 462 U.S. 919 (1983)..... 21-22

Christmann & Welborn v. DOE, 4 DOE (CCH) ¶26,467 (N.D. Tex. 1982)..... 12

Citronelle-Mobile Gathering Inc. v. Edwards 669 F.2d 717 (TECA 1982) *cert. denied* 459 U.S. 877 (1982)..... 18, 25

Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487 (1985)..... 24

Dames & Moore v. Regan, 453 U.S. 654 (1981)... 19

Department of Energy v. Ray L. Hunt et. al., 734 F.2d 816 (TECA 1984) 18

Diamond v. Chakrabarty, 447 U.S. 303 (1980) ... 19

Federal Power Commission v. Interstate Natural Gas Co. et. al., 336 U.S. 577 (1949). 17-18, 25, 26

Franks v. Bowman Transportation Co., 424 U.S. 747 (1975)..... 18, 25

Getty Oil Company v. Doe, 749 F.2d 734 (TECA 1984), *cert. denied* 105 S.Ct. 1176 ..... 11, 18

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 24

Grigsby v. Department of Energy, 561 F.Supp. 50 (W.D. La. 1982), *aff'd* 701 F.2d 147 (TECA 1983), *cert. denied* 103 S.Ct. 1780 (1983) 12

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

In re Department of Energy Stripper Well Exemption Litigation 578 F.Supp. 586 (D.Kan 1983). 6, 11

In re Folding Cartons Antitrust Litigation (1984-2) Trade Cases ¶66,189 (7th Cir. 1984) 23

Kaiser Aetna v. United States 444 U.S. 164 (1979) 19

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 19

Mitchell v. De Mario Jewelry, 361 U.S. 288 (1960). . 17

Matthews v. Eldridge, 424 U.S. 319 (1976). 24

Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950). 19

Pasco Inc. v. Federal Energy Administration, 525 F.2d 1391 (TECA 1975) 5

Porter v. Warner Holding Company, 328 U.S. 395 (1946) 17

RJG Cab et. al. v. Hoedel et. al., CA 83-3265 (E.D. Pa. 1985). 13-14

Springer v. Phillipine Islands, 277 U.S. 189 (1928) 21

Sundance Oil Company v. DOE, 4 DOE ¶26,345 (D.Col. 1981). 12

United States v. Morgan, 307 U.S. 183 (1939). . . . 17

United States v. Sutton, 4 DOE ¶26,501, (N.D. Okla. 1984) appeal pending Nos. 10-57, 10-58 (TECA) 14-15

TABLE OF AUTHORITIES—(*Continued*)

Cases: Page

ADMINISTRATIVE CASES

Belridge Oil Company/Tennessee et. al., 11 DOE ¶85,255 13

In the matter of A. Johnson and Co. et. al., 12 DOE ¶85,102 13

In the matter of Standard Oil Company (Indiana), 10 DOE ¶85,048, 11 DOE ¶85,185 ..... 13, 25

In re Adams Resources and Energy Inc. et. al., 9 DOE ¶82,553 13

In re Alfred B. Alkek et. al., 9 DOE ¶82,521 13

Standard Oil Company (Indiana)/Oklahoma et. al., 13 DOE ¶85,005 13

Standard Oil Company (Indiana)/Virginia et. al., 12 DOE ¶85,008 13

Worldwide Energy Corp. et. al./Texas, 12 DOE ¶85,006 13

CONSTITUTION

Article III, Sec. 2 2

Fifth Amendment 2-3

STATUTES

Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743, 748 ..... i, 2, 3

Economic Stabilization Act of 1970, Pub.L. 91-379, 84 Stat. 796 ..... i, 2, 3

Emergency Petroleum Allocations Act of 1973, Pub. L. 93-159, 87 Stat. 627, 633 ..... i, 2, 3

TABLE OF AUTHORITIES—(*Continued*)

Statutes: Page

Energy Conservation and Existing Buildings Act of 1976, Pub. L. 94-385, Title IV, 80 Stat. 1151, as amended, 42 USC §6861 et. seq. 8

Further Continuing Appropriations Act, 1983, Pub. L. 97-377, 96 Stat. 1830, 1891, 1919 (1982).. i, 4, 8, and *passim*

Interior Department and Related Agencies, Appropriations for Fiscal Year 1983, Pub. L. 97-394, 96 Stat. 1966 8

Low Income Home Energy Assistance Act of 1981, Pub. L. 97-35, 95 Stat. 893..... 8

EXECUTIVE MATERIALS

Department of Energy, Monthly Energy Review, August 1982..... 16

Energy Information Administration, DOE: Residential Energy Consumption Survey: Housing Characteristics 1982..... 16

Executive Office of The President, Office of Management and Budget: Budget of the United States Government Fiscal Year 1986 (Feb. 4, 1985)..... 9

Federal Highway Administration Highway Statistics Annual, 1978-80 16

Office of Hearings and Appeals, DOE: Report to the U.S. Dist. Ct., Kansas: In re Department of Energy Stripper Well Exemption Litigation M.D.L. 378..... 6-7, 24

Order Implementing Departmental Policy Regarding Crude Oil Overcharges (OHA, DOE) 50 Fed. Reg. 27,402 (1985)..... 14

TABLE OF AUTHORITIES—*(Continued)*

Executive Materials: Page

Statement of Restitutionary Policy of the Department of Energy 50 Fed. Reg 27,400..... 14, 20

REGULATIONS

10 C.F.R. Part 205, Subpart V (1985)..... 12

10 C.F.R. §211.67, 211.83, 211.93 (1981 and Prior)..... 5

CONGRESSIONAL MATERIALS

Congressional Record

128 Cong. Rec. (1982)

S15115-15119..... 7, 8, 9

S15125-15127..... 7, 8

H10435..... 9

131 Cong. Rec. (1985)

S5911-12..... 9

H3519..... 9

H3649..... 9

S10761..... 9

H7138 et. seq..... 9

H7166-67..... 9

Conference Committee Report 97-978, 97th Congress, 2nd Sess..... 8

Conference Committee Report 97-942, 97th Congress, 2nd Sess..... 8

General Accounting Office Report B214953 (Feb. 14, 1985)..... 7

No. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

UNITED STATES OF AMERICA,
Plaintiff

v.

EXXON CORPORATION,
Defendant

NATIONAL FREIGHT, INC.,
RJG CAB INC., and
GERALDINE H. SWEENEY,
Intervenor-Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

National Freight, Inc., RJG Cab Inc., and Geraldine H. Sweeney hereby petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, certiorari to be limited to the issue of the remedy determination.

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals of the United States (TECA) is as yet unreported, although it does appear at 4 DOE (CCH) §26,539; it is set forth in full in the Appendix submitted in connection with the Petition for Writ of Certiorari of the National Oil Jobbers' Council, et al. filed in the instant proceeding (referred to as the "NOJC Appendix"), Appendix A at page A-1. The Opinion and Order of the United States District Court for the District of Columbia is reported at 561 F. Supp. 816; it appears in the NOJC Appendix C beginning at page A-191.

JURISDICTION

TECA's judgment was entered on July 1, 1985. A timely Petition for Rehearing was denied on August 15, 1985. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748 (previously codified at 12 U.S.C. §1904 Note (1976)), as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article III, Section 2:

> "The Judicial Power shall extend to all Cases, in Law, and Equity, arising under this Constitution, the Laws of the United States, . . ."

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private

> property be taken for public use, without just compensation."

Section 209, the Economic Stabilization Act of 1970 as amended (previously codified at 12 U.S.C. §1904 Note (1976)):

> "Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, *the court may also order restitution of moneys received in violation of any such order or regulation.*" (emphasis supplied)

STATEMENT OF THE CASE

This is an action under Section 209 of the Economic Stabilization Act, *supra*, brought by the Department of Energy ("DOE") against Exxon Corporation ("Exxon") for violation of crude oil pricing regulations promulgated first pursuant to the Economic Stabilization Act, *supra*, and continued under the authority of the Emergency Petroleum Allocation Act of 1973 as amended, *supra*.

On cross motions for summary judgment, the Court held Exxon liable for $895,501,163.85 in overcharges plus interest, and entered a judgment for $1,635,604,638.10 representing interest through June 7,

1983. With additional interest for more than two years since, the amount is in excess of $2 billion.

As to the issue of remedy, the DOE Complaint sought refund to the United States Treasury. On three occasions during the proceeding, various parties sought to raise the issue of remedy, *i.e.*, the disposition of any amount ordered to be refunded — first Exxon by Petition to Interplead the purchasers of the crude oil in February 1981, then various independent refiners by Motion to Intervene on November 24, 1982, and finally, independent gasoline retailers on January 20, 1983. On each occasion, the Court entered Orders staying consideration of remedy until after determination of liability. (NOJC Appendix, D-1, D-2, D-3 at A-286 et seq.)

Without any notice that it was considering remedy, the Court rendered a decision which found that Exxon had indeed overcharged for crude oil, denied the pending motions for intervention, and ordered that the refund be disbursed to the State governments for use in five federal programs which had been previously solely funded by Congressional appropriation. In doing so, it adopted a distribution plan which Congress had used as to $200 million in settlement funds which had been received by the Department of Energy in connection with alleged overcharges in crude oil and refined product sales. Section 155, Further Continuing Appropriations Act, 1983, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982), commonly known as the "Warner Amendment". (NOJC Appendix F-3, at A-314.)

The District Court had no evidence before it as to the impact of overcharges on refiners or resellers through whom the overcharged product passed en route to consumers, nor any evidence as to the impact on various groups or classes of consumers, e.g., motorists and commercial truckers.

The District Court determined, without evidence, (i) that the effect of the regulatory program has been to pass through all overcharges to ultimate end users, but (ii)

that it was impossible to trace the overcharges to particular end users.

The relevant facts with regard to the Court's determination are:

> 1. *As to its determination that the regulatory program passed all overcharges through to consumers:*
>
> (a) The first purchaser from an overcharging producer did essentially share the overcharges with all refiners in the United States. Such was the effect of the Entitlements Program, a part of the regulatory system which essentially equalized the cost of crude oil to all refiners, thus passing through to all refiners any overcharge to any of them.[1]
>
> (b) Neither the refiners who converted crude oil into product, nor the resellers through whom the oil products thereafter passed, necessarily recovered, by virtue of the regulatory framework, their costs. The regulatory system, by creating maximum lawful selling prices, provided the legal opportunity to pass all costs through, but no assurance that all costs would be recovered.[2]
>
> (c) In a subsequent proceeding to *Exxon*, a district court facing a similar situation of crude

1. The Entitlements Program was established by a predecessor agency to the DOE, 10 C.F.R. 211.67 (1974), and continued until decontrol on January 28, 1981, by regulation 10 C.F.R. §211.67 as amended from time to time. A good brief description of the program is set forth by Judge Estes of the Temporary Emergency Court of Appeals in *Pasco Inc. v. Federal Energy Administration*, 525 F.2d 1391, 1394-1395 (TECA 1975), the relevant excerpt from which is set forth in Judge Becker's dissent here, NOJC Appendix, at A-161-162.

2. 10 C.F.R. §S212.83, 212.93 (1981 and prior).

oil overcharges involving, with interest, approximately $1 billion, rejected the abandonment of an effort to determine economic injury, *In re the Department of Energy Stripper Well Exemption Litigation*, 578 F. Supp. 586, 595-596 (D. Kan. 1983), and referred the matter to the Office of Hearings and Appeals of the Department of Energy (OHA) for its factual determination as to injury and its recommendation to the Court as to restitution. In that proceeding, in a Report to the referring Court which was filed with TECA immediately prior to the issuance of its decision here, OHA found, based upon expert economic testimony, that refiners had absorbed between 2.7% and 8.1% of crude oil overcharges, passing on the balance to their direct purchasers (such as large truckers) and to resellers, who in turn supplied gasoline to ordinary motorists and smaller commercial users. The OHA, in its Report, also endorsed a methodology which would (i) permit the same determination of absorption to be made as to resellers and, therefore, by deduction, to consumers, and (ii) permit the distribution of overcharges at a given level of distribution, e.g., refiners, among the individual firms.[3]

2. *As to the determination that no precise tracing of overcharges could be accomplished:*

(a) The OHA Report in the *Stripper Well Litigation, supra*, although agreeing in general that tracing with precision is impossible, determined that injury could be established by economic analysis at the distribution level (*e.g.*, to

3. Report to the United States District Court for the District of Kansas *In re Department of Energy Stripper Well Exemption Litigation*, MDL 378, by the Office of Hearings and Appeals of the Department of Energy. NOJC Appendix G, at A-318.

refiners, and direct purchasers from refiners), and employed in so doing a methodology permitting distribution among the firms or individuals within each distribution level.[4]

(b) The acceptance of a standard of precision as the requirement for restitution was inconsistent not only with the repeated decisions of this Court and Courts of Appeals (*See*, page 25, *infra*), but with decisions of the OHA in its distribution, already completed, of at least $70 million in funds collected from overcharges in oil products.[5]

3. *As to the Congressional precedent in distributing $200 million to the States for the five federal energy programs:*

(a) The expressed Congressional intention in appropriating $200 million of overcharge settlements collected to the States was to assist the poor in the payment of natural gas bills, in view of the Congressional inability to enact legislation controlling rapidly accelerating natural gas bills in late 1982.[6]

The particular federal program which assisted the poor in payment of natural gas bills

4. Although the OHA found "no party in this proceeding has suggested" a methodology which would enable a refiner-by-refiner distribution (OHA Report, NOJC Appendix G, at A-379), the witness presented by utility and surface transportation end users, Dr. Peter Linneman, upon whom the OHA Report relied (NOJC Appendix G at A-369, 381) did present such a methodology; indeed, it was the same methodology for individual refiner distribution which OHA accepted as to refiner class impact.

5. General Accounting Office Report B-214953, February 14, 1985.

6. The announced purpose of the Warner Amendment is found in the Congressional debate, 128 Congressional Record, S. 15115-15119, 15125-15127, December 16, 1982.

was that of The Low Income Home Energy Assistance Act of 1981, Pub. L. 97-35, 95 Stat. 893, *as amended*, 42 U.S.C. §8621, *et seq*. Another of the five federal programs authorized for use in the expenditure of Warner Amendment funds similarly assisted poor people in home energy costs by providing materials for the weatherization of their homes. Pub. L. 94-385, Title IV, Section 411, 80 Stat. 1151, 42 U.S.C. §6861 *et seq*.

(b) The two programs benefitting the poor which were the intended dominant beneficiaries of the Warner Amendment were also the dominant programs in terms of Congressional appropriations, accounting for 95% of the federal appropriations for all five federal programs.[7]

(c) In enacting the Warner Amendment, Congress was aware of the fact, and was indeed concerned, that natural gas costs were not affected by crude oil or oil product overcharges which it was appropriating, since the source of natural gas is not crude oil.[8]

(d) In enacting the Warner Amendment, Congress viewed the $200 million appropriation as the correct amount to supplement the regular federal appropriations of almost $2 billion for low

---

7. The computation of the portion of total federal appropriations devoted to the poor relies upon Public Law 97-377, 96 Stat. 1891; Pub. L. 97-394, 96 Stat. 1966, 1986, Conference Committee Report 97-978 and House Committee Report 97-942, 97th Congress, Second Session. In the projected Fiscal 1986 Budget, in which only one of the three non-poor persons programs remains funded, 92% of the projected appropriations are for low income home energy assistance, and presumably the major portion of the balance is for weatherization of poor persons homes. See footnote 10.

8. 128 Cong. Rec., S15117-15118, S15126, December 16, 1982.

income home energy assistance, and indeed expressed its intention that such diversion of energy overcharge funds to the poor was to be a one-time only phenomenon.[9]

(e) Indeed, Congress now is being urged by the Executive to utilize overcharge recovery funds, such as those in Exxon, to fund The Low Income Home Energy Assistance Program and the other federal programs, in place of general Treasury funds for such purposes.[10]

---

9. 128 Congressional Record H10435, S15116, December 16, 1982.

10. The Presidential budget submission for fiscal year 1986 reflects the use of $191 million of "funds recovered by the Federal Government from petroleum pricing violations" as the sole source of funding "the weatherization and the schools and hospitals programs," and the availability of $809 million from "petroleum overcharges" for use in funding the $2.1 billion to be expended in The Low Income Home Energy Assistance Program, the balance to be provided by Treasury appropriations (Executive Office of the President, Office of Management and Budget: Budget of the United States Government, Fiscal Year 1986, 5-34, 39-40, 117, 128). Senate Concurrent Resolution 32, adopting the Fiscal 1986 budget, enacted by the House and Senate August 1, 1985, 131 Cong. Rec. H7166-67, S10761, shows the $1 billion reflected in the Presidential submission as an offsetting revenue receipt in functional code 950 rather than in functional codes 270 and 600, as submitted by the President. 131 Cong. Rec. H7138 *et seq*. Both the Presidential submission and Senate Concurrent Resolution 32 also reflect the availability of $1 billion in oil overcharge funds in fiscal 1987 and 1988. It is unclear in the Congressional debate whether the Exxon funds are to be considered as an offset against the regular appropriations for The Low Income Home Energy Assistance Program, the weatherization program, and the schools and hospitals program 131 Cong. Rec. S5911-12 (May 9, 1985); H3519 (May 22, 1985); H3649 (May 23, 1985); the matter remains one for determination in the appropriations process. The position of the Executive would appear clearly to be that the Exxon funds are to be considered available to offset the normal appropriations for these programs. *See*, Footnote 18 and Appendix H and I.

After rendering its decision, before entering final judgment, the District Court reconsidered its prior denial of intervention and, both before and after final judgment, granted motions of various parties to intervene, specifically finding "that the applicants for intervention are entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2)." (NOJC Appendix D-6 at A-294.) The Court limited intervention solely to appeal of its remedy determination, taking no evidence on remedy, and finally entering judgment June 7, 1983.

On appeal, the Temporary Emergency Court of Appeals affirmed in an opinion by Judge Brown, with Judge Becker dissenting on the issue of remedy.

Applications for rehearing, with a suggestion it be *en banc*, were made by various parties, including the Petitioners, and were denied by Order dated August 15, 1985, (NOJC Appendix, at B-1, A-187).

Petitioners are three motor vehicle surface transportation users of oil products, a large trucking company using diesel fuel (National Freight, Inc.), a taxicab company (RJG Cab Inc.), and an individual motorist (Geraldine H. Sweeney) using gasoline. They seek to represent motor vehicle surface transportation end users of oil products, who consumed approximately 45% of the oil products[11] refined in the United States, and, when and if permitted the opportunity, Petitioners will seek class certification.

REASONS FOR GRANTING THE WRIT

Petitioners seek certiorari solely on the issue of remedy, believing, as did Judge Becker in his dissenting Opinion in the Temporary Emergency Court of Appeals, that the District Court was correct in determining the liability.

---

11. See Footnote 19.

The decision below disburses $2 billion of crude oil overcharge funds, and will be of precedential significance in the disbursement of an additional $2 to $5 billion in overcharge funds.[12]

Not only does the economic significance of the case merit review but, even more importantly, the decision below stands for three precedential principles, each of which is inconsistent with prior opinions of this Court and of the various Circuits, and each of which threatens significant disruption in the operation of the Judiciary, thus meriting the exercise of this Court's supervisory powers.

Most importantly, the decision below almost inevitably assures a conflict between the Courts and the Congress in the disposition of the crude oil overcharge funds, in this case and in the other overcharge cases pending.

I. The *Exxon* Decision is Having an Unsettling Effect on the Relationship Between the Congress and the Judiciary in the Disbursement of Crude Oil Overcharge Funds: It Threatens a Usurpation of Judicial Authority by the Executive and the Legislature.

The Exxon decision marks the second step in a disruption of the allocation of powers as among the Judiciary, the Executive and the Legislature as to disposition of oil overcharge funds recovered by the Department of Energy. Unless this Court exercises its authority, the

12. Among the larger crude oil cases pending in the Courts are the *Stripper Well Litigation*, *supra*, involving between $1 and $1.5 billion, depending on the disposition of certain motions to vacate dismissal orders as to some of the plaintiffs and *Getty Oil Company v. DOE*, 749 F.2d 734 (TECA 1984), *cert. denied* 105 S. Ct. 1176, involving some $300 million. In OHA, pending Subpart V petitions (pursuant to 10 C.F.R. Part 205, Subpart V) involve between $500 and $700 million in crude oil overcharges. Among other major matters pending in OHA, are proposed remedial orders to Texaco, Inc. involving $2 billion (DRO-0199, OHA) and to Cities Service Company, involving $500 million (HRO-0285, OHA).

usurpation of the Judicial power by the Executive and the Legislature will continue, and indeed accelerate.

First, some background is appropriate. The disposition of overcharge recoveries during the regulatory period was, in most cases, to refund to the first purchaser of the overcharged product, on the assumption that the combination of regulation and free market competition during the refund period would parallel that in the overcharge period, accordingly accomplishing a refund to those overcharged. Such was particularly true as to crude oil overcharges. Since the Entitlements Program equated the cost of crude oil to all domestic refiners, and accordingly affected the entire market, it was assumed that refunds would also be passed through the Entitlements Program and benefit the downstream purchasers in the same way as overcharges had injured them. Deregulation eliminated the efficacy of first purchaser refund as a method of assuring restitution.[13]

In the post-regulatory period (after the January 1981 deregulation), the Office of Hearings and Appeals of the Department of Energy ("OHA"), charged with the responsibility under a regulatory procedure of determining to whom refunds should be made both in connection with settlements and in connection with administrative overcharge determinations,[14] developed a set of economic assumptions as to injury in disbursement of refunds of overcharges in the sale of oil products. In general, the OHA provided resellers and end users the opportunity to claim refunds, and then disbursed the balance to the States for the benefit of end users, insisting

---

13. *Grigsby v. Department of Energy*, 561 F. Supp. 50, 54 (W.D. La. 192), *aff'd.* 701 F.2d 147 (TECA 1983), *cert. denied* 103 S. Ct. 1780 (1983); *Sundance Oil Co. v. DOE*, 4 DOE ¶26,345 (D. Col. 1981); *Christmann & Welborn v. DOE*, 4 DOE ¶26,467 (N.D. Tex. 1982).

14. 10 C.F.R. Pat 205, Subpart V, 205.280 *et seq.*

that in each case the States develop a plan which would assure restitution to those who had been injured by the overcharges involved.[15]

In connection with crude oil overcharge refunds, the OHA made no further progress than the first step, permitting first purchasers to make claims, although expressing skepticism over the extent of refiner injury, and deferring determination as to downstream refunds.[16]

In December, 1983, the U.S. Congress made the first wholesale disbursement of crude oil overcharge funds, as well as of product overcharge funds, as to which OHA had not yet undertaken to act, in the Warner Amendment, *supra*. Its appropriation of $200 million of overcharge funds to the States, was made for the express purpose of assisting the poor in the payment of natural gas bills through the Low Income Home Energy Assistance Program, one of the five programs authorized for expenditure by the States in the legislation, and the program clearly intended to be predominantly used by Congress.

The Warner Amendment incursion by Congress on the powers of the Executive, subject to Judicial review, to determine restitution was the first step in the disruption of the relationship between the branches of government in the disposition of oil overcharge funds.[17]

---

15. *See, e.g., In the Matter of Standard Oil Company (Indiana)*, 10 DOE ¶85,048, 11 DOE ¶85,185; *Worldwide Energy Corp., et al./Texas*, 12 DOE ¶85,006; *Standard Oil Company (Indiana)/ Virginia, et al.*, 12 DOE ¶85,008; *Belridge Oil Company/Tennessee, et al.*, 11 DOE ¶85,255; *Standard Oil Company (Indiana)/ Oklahoma, et al.*, 13 DOE ¶85,005.

16. *See, e.g., In re Alfred B. Alkek, et al.*, 9 DOE ¶82,521; *In re Adams Resources and Energy, Inc., et al.*, 9 DOE ¶82,553; *In the Matter of A. Johnson and Co., et al.*, 12 DOE ¶85,102.

17. The constitutionality of the Warner Amendment was challenged by these Petitioners in *RJG Cab, Inc., et al. v. Hoedel, et al.*, C.A. 83-3265 (E.D. Pa.). On August 19, 1985, a decision was rendered by Judge Raymond Broderick, dismissing the Complaint on

The second step in the disruption of the separation of powers as among the branches of government is the decision here as to which certiorari is sought. By following the guidance of Congress in the Warner Amendment as to an amount ten times the Warner appropriation amount, the Court not only surrendered its equitable (and statutory) duty to work restitution, but also encouraged the Executive and the Legislature to abrogate to the Legislature the determination of restitution which it had specifically assigned to the Judiciary.

The results are already apparent, and pose the threat of further disruption of the relationship between the branches of government and the inevitable litigation which will follow.

Thus, the Executive is now suggesting in crude oil overcharge cases that the Courts, in cases pending before them, and its own OHA in refund proceedings before it, abjure any refund procedure, and instead defer to Congress for a determination of how to expend the overcharge refunds.[18]

NOTES *(Continued)*

the dual grounds of lack of standing and failure to exhaust administrative remedies, and not reaching the Constitutional challenges, to wit, that the Warner Amendment deprived Petitioners and other end users of procedural due process rights to claim against the funds and of their property for the public use of assisting the poor without compensation, and constituted an unconstitutional interference by the Legislature with the Executive and the Judiciary. The decision will be appealed.

18. Statement of Restitutionary Policy of the Department of Energy and Order Implementing Departmental Policy Regarding Crude Oil Overcharges, 50 Fed. Reg. 27400-03, Appendix H at B-1. Earlier, before the issuance of the OHA Report in the *Stripper Well Litigation*, DOE had successfully urged the District Court in *The United States v. Sutton*, 4 DOE ¶25,501 (N.D. Okla. 1984), *appeal pending*, Nos. 10-57, 10-58 (TECA), to order disbursement of $425 million in crude oil overcharge refunds to the States for three of the Warner Amendment programs, including the Low Income Home Energy Assistance and Weatherization Programs, providing the Court with a draft of legislation it was sponsoring in Congress which

And Congress, at the urging of the Executive, has at least tentatively committed itself to recognizing offsetting revenue to the appropriations for the federal programs authorized for use in Exxon, particularly the Low Income Home Energy Assistance Program, on the assumption that Exxon funds, and/or funds in other cases pending, would be available to the States for such programs. (*See*, Footnote 10).

If the Executive persists, and Congress agrees to apply its policy to the Exxon funds, then the Judicial determination to award the funds to the States for the five programs will be converted, by Congress, into an award to the United States Treasury, since the Exxon funds would be used to avoid what would otherwise be Treasury expenditures for the same programs.

Obviously, any such Congressional enactment will lead to further litigation, raising serious questions as to the assignment of powers as among the branches of government.

Only this Court's grant of certiorari and reversal of the remedy determination by the District Court with instructions to discharge the duty of restitution will prevent the threat to Judicial sovereignty in the disposition of judicially determined crude oil overcharges.

---

would utilize oil overcharge refunds to fund those programs, reducing the use of Treasury funds for such purposes. Appendix I, at B-19. In the pending appeal by the defendant in *Sutton*, these Petitioners were granted amicus curiae status by TECA on an application seeking such status for the sole reason of raising the remedy issue which had not been raised by appellant.

II. The District Court's Decision to Abandon a Restitution Effort Mandated by Statute in Favor of Assisting the Poor is Inconsistent With Decisions of this Court and the Circuits, Constitutes a Taking of the Property of Petitioners for Public Use Without Compensation in Violation of the Constitution, and Creates a Dangerous Precedent of Permitting Social Legislation By the Court.

The District Court determined that Exxon's overcharges "were borne by ulitmate consumers of petroleum products throughout the entire country," 561 F. Supp., at 853. Assuming, and the Court did not find otherwise, that the overcharges were spread proportionately to all oil products, motor vehicle surface transportation end users suffered 45% of the injury.[19]

Despite the inevitable inference that surface transportation users of oil products bore approximately 45% of the injury, the Court then determined to award the fund essentially to the poor for use in paying home heating costs, without regard to whether home heating was supplied by an oil product (largely #2 oil), natural gas, or electricity; indeed assuming use of the funds in proportion to the energy source of home heating, 56% of the funds will be made available to poor persons heating with natural gas, a fuel not derived from crude oil, the source of the overcharges.[20]

The District Court acknowledged that it was assisting the poor, noting that the five federal programs it was

---

19. In 1978 through 1980, between 44% and 45% of petroleum product supplied was used in motor vehicle fuel consumption, principally in the form of gasoline and diesel fuel. Federal Highway Administration Highway Statistics Annual 1978-80, Department of Energy Monthly Energy Review, August 1982.

20. Indeed, less than 19% of home heating is by products derived from crude oil. Energy Information Administration, DOE: Residential Energy Consumption Survey: Housing Characteristics 1982.

authorizing for funding by the States operated by "reducing overall consumption through conservation or *by direct financial assistance to those most in need.*" 561 F. Supp., at 857 (emphasis supplied).[21] In fact, of course, the dominant use was to be "financial assistance to those most in need," the poor. Such was the intent of Congress in enacting the Warner Amendment which the Court acknowleged was its guideline; since 95% of the federal appropriations for the five programs was for the poor persons programs, it is inevitable that the poor persons program expenditures would represent the overwhelming use of the Exxon funds (*See*, Statement of the Case, at 8).

Such a diversion from surface transportation end users, and indeed from the broad range of home heating oil users of fuel and the general population which bore the cost of goods and services inflated by overcharges in the costs of oil products, violates three important principles:

> (a) the principle that "restitution", here doubly mandated, (i) by the applicable principles of equity, *Porter v. Warner Holding Company*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960); *United States v. Morgan*, 307 U.S. 183 (1939), and (ii) by statute, Section 209 of the Economic Stabilization Act, "plainly cannot be discharged by payment of the fund to those who show no loss . . . ." *Federal Power Commission v. Interstate Natural Gas Co., et al.*, 336 U.S. 577, 582 (1949). As Justice Frankfurter explained in his concurring opinion in *Interstate*:
>
> > ". . . it is now the duty of the Court to make that retrospective determination not by unfounded assumptions erected into rigid rules, but by

21. The Temporary Emergency Court of Appeals was somewhat less forthright, describing the authorized programs as "designed to benefit all citizens." (NOSC Appendix A at A-85)

> ascertainment of what actually would have happened contemporaneously had purchasers from Interstate obtained their gas at the lower rate."

336 U.S., at 586.

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1975), quoting Congress, the object of the exercise of equitable powers of restitution is to make the victims whole "so far as possible, and restored to a position where they would have been were it not for" the unlawful violations.

So indeed held the Temporary Emergency Court of Appeals itself in the landmark case of *Citronelle-Mobile Gathering Inc. v. Edwards*, 669 F.2d 717, 722-723 (TECA 1982), *cert. denied*, 459 U.S. 877 (1982), where it reversed a district court award of crude oil overcharge funds to the U.S. Treasury, holding that "payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved," and that there is a "*duty* to try to ascertain those overcharged and refund them with interest from the restitution funds." In subsequent decisions, the Temporary Emergency Court of Appeals added to its instructions in *Citronelle-Mobile* that there must be a proceeding in which those claiming an entitlement to restitution funds may participate. *Getty Oil Co. v. DOE*, 749 F.2d 734, 739 (TECA 1984), *cert. denied* 105 S. Ct. 1176; *Department of Energy v. Ray L. Hunt, et al.*, 734 F.2d 816, 826 (TECA 1984). As Judge Becker notes in his dissent here, the instant decision by TECA apparently undercuts the authority of all those cases, particularly *Citronelle-Mobile*.

(b) The Fifth Amendment Constitutional principle prohibiting the taking of property for a public

use without compensation. *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 122 *et seq.* (1974); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979); *Dames & Moore v. Regan* 453 U.S. 654, 689-690 (1981). Nor, of course, is there any doubt that the right to restitution is a cause of action and, therefore, the kind of property right entitled to due process protection. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 429 (1982); *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950).

The District Court here, having held that injury was to petitioners and other consumers, has deprived them of their property rights to recover the disgorgement funds by its award of the funds to the poor.

(c) The principle that Courts should refrain from social legislation and restrict themselves to interpreting and applying the statutes as written. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). A judicial determination that overcharges to consumers at all economic levels should be returned disproportionately, and indeed essentially exclusively to the poor, is the kind of proposition that the Courts are "without competence to entertain," and ". . . [which] should be addressed to the political branches of the government, the Congress and the Executive, and not to the Courts." 447 U.S., at 317.

One of the dangers about which the Court warned in *Diamond v. Chakrabarty*, is the absence of the "kind of investigation, examination and study that legislative bodies can provide and courts cannot." 447 U.S., at 317. That danger has indeed been embraced by the Court here by virtue of an appropriation for the five programs which is ten times that provided by Congress in the

Warner Amendment and almost equal to the regular annual Congressional appropriation for all five programs. Indeed, the Executive has urged the *Stripper Well Litigation* Court facing the same issue that it should refrain from using the poor persons appropriations route approved by the Temporary Emergency Court of Appeals in *Exxon*, because "the States cannot make effective use of additional monies [beyond those appropriated by Congress and awarded by the *Exxon* and *Sutton* Courts] for these programs at this time." (Appendix H, at B-10). As a result, the issue of whether the designated federal programs should appropriately be funded with additional overcharge funds necessarily becomes a consideration of the Courts in Section 209 proceedings; such makes the Court into a legislature, the very danger against which this Court warned.

The threat of Judicial social legislation is exascerbated by the basis of the affirmance of the District Court's action here by TECA, to wit, the exercise of discretion. If one district court is operating within its discretion to benefit the poor on the basis that they suffered the most from high energy prices, may another court determine that the Northeast States, more dependent upon oil for their energy needs, suffered the most economically and that therefore overcharges throughout the country should be refunded to them? Different dispositions of refunds of essentially similar overcharges, *i.e.*, crude oil, are not only to be tolerated, but indeed apparently to be encouraged. The lack of any standard for testing the exercise of discretion threatens the rule of law which requires both predictability and consistency. Restitution to the injured is not only an appropriate goal by virtue of the mandate of equitable principles and the Statute, it is a necessary standard if the rule of law is to be served.

III. The Court's Decision to Defer to Congress in Determining How to do Equity is Inconsistent With Decisions of this Court With Regard to the Constitutionally Mandated Separation of Powers and Creates a Dangerous Precedent Encouraging Congressional Interference With the Courts.

The District Court acknowledged that it was deferring to the "wisdom of the solution chosen by Congress" in its Warner Amendment disposition of $200 million in Consent Order funds to meet an urgent need in the winter of 1982-3 for poor persons to pay home heating bills.

The principle of such deference to Congress permits Congress to effect specific adjudications under a statute establishing a general standard and leaving to the Courts the applications of that standard. To permit Congress to do so is to permit a "supervening legislative action . . . [which] implies a radical alteration of the role of the federal courts," of a more serious nature than that struck down for that reason, *inter alia*, in *Chadha v. Immigration and Naturalization Service* 634 F.2d 408, 430 (9th Cir. 1980), *aff'd.* 462 U.S. 919 (1983).

The effect of the deference to Congress is to permit Congress to violate the "general rule inherent in the American Constitutional system that unless otherwise expressly provided or incidental to the powers conferred, a legislature cannot exercise either Executive or Judicial power . . ." *Springer v. Phillipine Islands*, 277 U.S. 189, 201-202 (1928); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976); *INS v. Chadha, supra.*

The danger of Congressional adjudication is at least twofold: (i) the lack of "established substantive rules . . . [and] procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or agency adjudicates individual rights." *INA v. Chadha, supra,* 462 U.S. at 966; and (ii) because, as in the Warner Amendment, "no principled basis was articulated for the decision of the Legislature,

the Executive and Judiciary have no basis for determining appropriate future action." *Chadha v. INS*, 634 F.2d, at 432. The second of these dangers was most particularly realized here. The question of whether Congress, which declared its $200 million appropriation in the Warner Amendment, to be a one-time and non-precedential decision to meet a 1982 emergency situation, would desire the same use of ten times the amount in 1986 when the Exxon fund becomes available for distribution is one which cannot be answered by the Courts.

Nor, as noted, can the Courts have any assurance that Congress will recognize an adjudication here based upon its own prior adjudicative determination in the *Warner Amendment*. Emboldened by the knowledge that it can affect adjudications by the Courts, Congress may, as is here possible, take away what the Courts have given by reducing its own appropriations.

IV. The Court's Denial of the Right to Participate to Those Who it Specifically Found Had Been Injured and Deprived of Their Property and Who It Declared to Be Intervenors of Right Denied Them Procedural Due Process and Creates a Dangerous Precedent Permitting Effective Denial of Intervention of Right.

The District Court found in its decision that the Exxon overcharges were "borne by ultimate consumers of petroleum products throughout the entire country." 561 F. Supp., at 853.

These Petitioners are such "ultimate consumers" and as they advised the Court in their Motions to Intervene seek to represent the interest of all motor vehicle surface transportation users of oil products, representing 45% of the use of oil products in the United States.

The District Court granted them intervention, presumably as a matter of right under Fed. R. Civ. P. 24(a), as it had previously, post-decision and pre-judgment,

specifically granted intervention of right to refiners, wholesalers and retailers on the one hand, and to the several State governments on the other.

Petitioners, however, were limited as had been those to whom the Court had previously granted intervention under Rule 24(a), to participation on the appeal of the Court's judgment, and solely as to the remedy issue.

In its post-decision Memorandum with regard to intervention on April 29, 1983, the District Court acknowledged (i) that the remedy which it "fashioned" was one which "DOE never pursued or even suggested," thus providing no pre-decision notice to potential claimants of the Court's remedy selection, and (ii) that it had "stayed earlier motions to intervene by industry applicants pending resolution of the issue of Exxon's liability."[22] Had there been notice that the Court was considering a result which would preclude claims by the consumers the Court found injured, and had the Court not effectively assured would-be intervenors that they would be provided the opportunity to assert their claims to restitution later, Petitioners would have sought intervention at an earlier stage.

The sole justification which the District Court offered for the denial of effective intervention was its determination that for an intervening consumer or group of consumers to succeed would require the tracing of overcharges and a precise calculation of injury, and that such is impossible.

The precedential principle for which the District Court's denial of effective intervention therefore stands

---

22. NOJC Appendix D-6, at A-292 *et seq.*; had the Court granted the prayer of the Complaint and awarded the fund to be deposited in the Treasury, a claim process would have been available, even if the Court had not ordered one prior to such deposit. *In re Folding Cartons Antitrust Litigation*, (1984-2) Trade Cases ¶66,189 (7th Cir. 1984).

is that a court may deny intervention even if it finds that the intervenor has been injured in his property right if it believes the intervenor will be unsuccessful in his claim.

Such is tantamount to conditioning the right to a due process hearing on a prior determination that the applicant for the hearing will succeed in his cause. Such is directly in conflict with the repeated decisions of this Court providing for a hearing before the deprivation of a property right. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Matthews v. Eldridge*, 424 U.S. 319 (1976). As this Court recently pointed out:

> "The point is straight forward: The due process clause provides that certain substantive rights —life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. . . . 'While the legislature may elect not to confer a property interest . . ., it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' "

Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487 (1985), quoting from *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974).

Nor, in fact, was the District Court correct either in its holding as an economic fact that tracing is necessary to find the impact of overcharges in crude oil on a class of consumers or, as a legal matter, that precision is required as a condition of obtaining restitution.

As to the former, the OHA Report in the *Stripper Well Exemption Litigation* found, based on expert economic testimony, that the injury at the refiner level can be determined, and adopted a methodology which (i) would enable determination of injury at the reseller and end user levels, and (ii) which would permit allocation at each distribution level to the individual firms at that distribution level. Moreover, since the District Court finds,

whether correctly or not, that all overcharges were passed through to ultimate consumers, all that is necessary for it to develop a restitution plan is an allocation of injuries among groups of consumers.

As to the requirement of precision in determining injury for purposes of developing a plan of restitution, the law, as articulated by this Court and indeed by the Temporary Emergency Court of Appeals, requires only that there be such precision as is obtainable. As Justice Frankfurter explained in his concurring opinion in *Federal Power Commission v. Interstate Natural Gas Co., supra,* 336 U.S., at 586:

> "The task, then, for the Court of Appeals is to reconstruct, *as far as it can possibly be done*, what would have happened had no fund accrued . . . had purchasers from Interstate obtained their gas at a lower rate." (emphasis supplied)

As the Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1975), the object of restitution is to make the victims whole "so far as possible, and restored to a position where they would have been were it not for" the unlawful violations. *See also, Citronelle-Mobile Gathering Inc. v. Edwards, supra,* 669 F.2d, at 722.

Moreover, the impossibility of developing a restitutionary remedy which the Court assumed, without hearing Petitioners, is belied by the fact that OHA has indeed done so in product case after product case.[23]

Had Petitioners been permitted to participate as to the remedy determination, they would have pointed out to the Court that restitution to motor vehicle surface

---

23. *See*, footnote 15, *supra*; the only difference between a crude oil overcharge case and a product case is the tracing of the overcharge to the refiner level, and that is precisely possible by virtue of the Entitlement Program; the allocation among products at the refiner level is a task which OHA has undertaken. See e.g., *In the Matter of Standard Oil Company (Indiana)* 10 DOE ¶85,048.

transportation consumers is relatively simply accomplished, as *e.g.*, by reducing motor vehicle registration fees paid by them, possibly with different levels of reduction in recognition of the different levels of use, *i.e.*, passenger cars, cabs, and trucks. Obviously, such restitution on a per capita basis to current members of the class is not precise restitution, but it is also obviously more accurate than disbursing the funds to current poor people on the basis, not of use, but of economic need, or indeed distribution to the United States Treasury, thus making a fund available in proportion to current tax burdens.

The Temporary Emergency Court of Appeals sought to justify denial of intervention by suggesting that there is no property right in those injured as to oil overcharge funds received by the Federal Government, despite the statutory mandate of restitution, and that accordingly since there is no property right, there is no due process right. The precedential principle for which such a holding stands is that where a court collects, or permits the Executive to collect, overcharges to consumers, it is free to dispose of them as it sees fit. Such a principle not only ignores the statute but equally the repeated rulings of this Court with regard to the duty of a Court collecting overcharges which have been imposed upon injured citizens. *Federal Power Commission v. Interstate Natural Co., et al., supra,* and other cases cited at page 17-18, *supra.*

CONCLUSION

The Petition for Certiorari should be granted as to the issue of remedy, both because of the urgency of avoiding an immediate impending conflict between the Judiciary and the Legislative Branches over the disposition of oil overcharge funds, and because of the dangerous precedential principles for which the decision below stands — (i) that the Judiciary may engage in social legislation, (ii) that the Judiciary may defer to the Legislature in adjudicating individual cases, and (iii) that intervention of right to those with an admitted property interest may be effectively denied on the basis that intervenors will not be successful.

Respectfully submitted,

Philip P. Kalodner*
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

Attorney for Intervenor-
Petitioners
National Freight, Inc.,
RJG Cab, Inc., and
Geraldine H. Sweeney

DATED: September 13, 1985

*Counsel of Record

APPENDIX

(Appendix A through G submitted in connection with the Petition For Certiorari of National Oil Jobbers' Council and the Jobbers' Group, Independent Gasoline Retailers and Air Transport Association of America are relied upon by Petitioners herein: Appendix H and I follow)

APPENDIX H

Statement of Restitutionary Policy of the Department of Energy

This is the second of the two reports requested from the Department of Energy (DOE) by the court in its Order of May 7, 1985 in *In re: The Department of Energy Stripper Well Exemption Litigation*, MDL No. 378 (D.Kan., May 7, 1985). This report sets forth the DOE's policy of restitution for these crude oil overcharges in view of the findings of fact of the DOE's Office of Hearings and Appeals (OHA) in the first DOE report to the court, dated June 19, 1985.

After the DOE prevailed in the Temporary Emergency Court of Appeals on the validity of the DOE's stripper well regulations, the underlying lawsuit became an enforcement action concerned with the appropriate distribution of the declared overcharges that, for the most part, the plaintiffs had previously been required to deposit in an escrow account. Because this action had begun principally as a declaratory judgment and injunction action challenging the DOE's rulings and regulations during the period of price and allocation controls, the DOE had not had the opportunity to develop an institutional position with respect to the most appropriate means in a decontrolled economy to remedy the harm caused by the overcharges. Accordingly, the DOE sought to have this case remanded to the OHA so that OHA could apply its expertise to attempt to determine the specific incidence of the harm caused by the overcharges and to enable the Department to formulate an informed restitutionary policy in this case.

OHA has now completed its fact-finding regarding the first purchaser and refiner levels of the distribution chain. OHA's unequivocal conclusion is that it is impossible to trace the economic harm of the overcharges to particular firms or individuals. Indeed, none of the participants in the OHA proceeding attempted to trace the

overcharges. Essentially, OHA concluded that direct purchasers (as such) generally did not absorb the overcharges because they were reimbursed by the entitlements programs.[1] Tracing of overcharges is impossible in view of the spreading effect of the entitlements program, the fungibility of refiner costs and the consequent inability of firms and OHA to determine which costs were passed through and which, if any, were retained, and the high proportion of cost passthrough, among other factors.

OHA's finding that it is impossible to trace crude oil cost increases that were equalized by the entitlements program, as were the cost increases in this case, is consistent with the conclusions of the two district courts that have previously determined that the harm resulting from crude oil miscertifications cannot be traced. In *United States* v. *Exxon Corp.*, the court found that "the broad scattering [through the working of the entitlements program and the passthrough regulations] of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each."

---

1. The record was found to be inconclusive as to whether some small proportion of the overcharges may have been absorbed by refiner-direct purchasers who were undercompensated in some months by the entitlements program. Further hearings would be required were that factual question determined to be material. Any "undercompensation" would also, of course, have to be reduced by overcompensation in other months and the amount passed through to others, but the OHA has found that that determination of this passthrough is impossible to make on an individual firm basis. Because the entitlements program utilized industry-wide averages and was not intended to equalize each individual refiner's crude oil costs exactly, it is likely that from time-to-time most, if not all, refiners' post-entitlements crude oil costs from miscertified stripper well oil deviated from the average. Therefore, as a matter of policy, especially since the entitlements program was never intended to compensate for any such undercompensation, the DOE recommends against further complicating the refund proceedings by undertaking such a problematical course.

561 F.Supp. 816, 853 (D.D.C. 1983), *appeal docketed*, Nos. DC-91 *et seq.* (TECA July 6, 1983). Similarly, in *United States* v. *Sutton*, the court found, based upon the testimony before it, that tracing the effects of crude oil miscertifications is impossible. *United States* v. *Sutton*, Energy Mgmt. Court Decisions 1981-84 (CCH) ¶26,501, at 29,632 (N.D.Okl. August 17, 1984), *appeal docketed*, Nos. 10-57, 10-58 (TECA October 12, 1984). OHA's exhaustive proceedings, which included 20 days of testimony and resulted in a 12,958 page record, confirmed these conclusions in a proceeding in which all potential claimants were afforded an opportunity to establish a means for tracing.

Since tracing is impossible, OHA extensively examined whether econometric modeling methods, the subject of most of the testimony at the hearing, could be used to estimate with a reasonable degree of reliability the extent to which overcharges were passed through at the various levels of distribution in the industry. Using the method and the data that OHA found most reliable, OHA concluded that it is likely that refiners (as a class) passed through roughly 92 to 98 percent of all stripper well overcharges to their customers (as a class).

The reciprocal is, of course, a conclusion that refiners (as a class) may have absorbed roughly between two and eight percent of the overcharges. But, as the OHA repeatedly emphasized, this conclusion says nothing about the amount of the overcharges any particular refiner may have absorbed. Representing, as it does, nothing more than a rough average derived in turn from analysis of the limited data that has been collected regarding nationwide aggregate supply and demand sensitivity to price changes for crude oil, refining services and petroleum products, some refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more. Nothing in the econometric models purports to answer the question of which

refiners are above and which are below the average. Neither is it feasible, OHA has concluded, to answer that question through an attempt at direct tracing. Therefore, the one certainty is that it is impossible to determine to what extent any individual refiner did not pass through the proportionate share of the overcharges that was distributed to it in the first instance by the automatic operation of the entitlements program.

Since direct restitution based upon individual proof of harm is thus shown to be impossible, some other, indirect means of effectuating restitution must be used. While it might not be unlawful to make indirect restitution to refiners based upon some equitable distribution plan among refiners using a reasonable percentage figure between 2.7 and 8.1 percent, and excluding the share attributable to those producer-refiners who themselves violated the stripper well regulations,[2] the Department, as the agency charged with administering the price control enforcement program, has concluded that this is not the most desirable way to make restitution for the crude oil overcharges at issue in this case. The superficial appeal of putting a small part of the overcharge refunds into the hands of "real" firms in the face of the realization that the best efforts of economists and fact-finders still result in (1) great inexactitude in applying a modeling method establishing a range of best estimates of injury to the refiner class differing by a factor of three, and (2) any matching between the amount a particular refiner receives and the amount of harm suffered being purely coincidental.

---

2. Of course, plaintiffs in the *Stripper Well Litigation*, which include most of the largest integrated oil companies and account for more than half of the Nation's refining capacity, would be barred from receiving any portion of the refund by the doctrine of unclean hands. *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 723 (TEXA), *cert. denied*, 459 U.S. 877 (1982); *United States* v. *Exxon Corporation*, 561 F.Supp. at 853 n.55.

Additionally, refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. Moreover, hundreds of refiners would at least have to prove up their banks on a monthly basis to be eligible for a refund. Not only the OHA's present decision, but each of the hundreds of individual decisions might then be subjected to judicial challenges. Furthermore, the modeling method would require additional threshold hearings in an attempt to apply econometric methods to establish the most likely degree of overcharge absorption at the wholesaler and retailer levels of distribution for the proportion of petroleum products distributed through them and other downstream distributors.[3]

---

3. OHA found that such generic hearings would not be necessary for two classes of purchasers: consumers of petroleum products who purchased directly from refiners and large consumers who purchased products under contracts which provided for the passthrough of changes in entitlements program benefits. The latter class, if they were end-users, absorbed 10 percent of their *pro rata* share of overcharges, and the first group could be presumed to have absorbed roughly 96 percent. However, processing applications by such purchasers would be an unwieldy task since the number of direct purchasers from refiners, which includes (in addition to the airlines, public utilities, and the Federal Government) diverse groups of manufacturers and managers of large commercial buildings, could total tens of thousands of consumers. Moreover, even after administratively processing this large number of claims, there would be no more assurance that the money was actually getting back to the ultimate injured parties under this scheme than under other forms of indirect restitution. For example, while utilities would be subject to mandatory passthrough provisions to current customers, those customers are not necessarily the same as the injured customers who purchased products at the time of the violations. Similarly, the costs incurred by airlines were, at least in part, considered by the Civil Aeronautics Board in approving the airlines' fare

Once this was accomplished, the ensuing individual claims procedures for the thousands of wholesalers and retailers would have to be conducted. Again, distribution most likely would be delayed substantially by numerous challenges in court.

The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method. OHA estimated that approximately two to eight percent of the overcharges were absorbed by refiners (more than half of which is attributable to those with unclean hands). OHA did not advance to the point where it could make an econometric examination of the probable degree of passthrough at the petroleum product wholesaler and retailer levels. However, given that OHA's rough estimates were based in part on national product data also applicable to downstream distributions, and that DOE's experience gained in the course of DOE enforcement audits and regulatory actions indicates that during the period when most of the stripper well violations occurred wholesalers and retailers were generally able to pass through their cost increases, it is unreasonable to assume that application of the OHA methodology to wholesalers and retailers as a class would result in a pass-through figure significantly less in magnitude than that for refiners. Thus, the econometric method would most likely distribute only a very small percentage of the overcharges, probably in the range of three to eleven percent (given the unclean hands of so many refiners). It thus appears that almost all overcharges were passed through to ultimate consumers regardless of whether those consumers purchased petroleum products directly from refiners or

---

NOTES *(Continued)*

structures during the period prior to deregulation. Now, however, in view of decontrol of the airlines, there is no mechanism to get this money back to those customers who paid the increased fares.

whether they purchased petroleum products through intermediaries. This conclusion, based upon the extensive OHA report, is consistent with the intended workings of the price control program and with the conclusions reached by the district courts in the *Sutton* and *Exxon* cases.

This means that any potential refunds to distributors of petroleum products would be quite small. For example, at the jobber level alone, assuming a four percent level of injury, the average refund to each of the 24,000 wholesalers and wholesaler-retailers (which does not include firms which are solely retailers) could be only about $800.[4] The same is true at the utility level. Even if one takes the best case, where a utility purchased from a refiner under a contract which passed through all entitlements costs, the refund to each customer is quite small. For example, Southern California Edison Company, in its comments before OHA, claimed to be the largest oil consuming utility in the Nation, having purchased about 330 million barrels of fuel oil during the entire control period under contracts providing for the direct flow through of the impact of entitlements from refiners to Edison. Since California Edison serves approximately nine million persons, its customers would receive on the average only about $1.20 even if all 330 million barrels were purchased in 1978-1980 when the primary violations occurred. Of course, even here there

4. The overcharges and interest are approximately one billion dollars. About 49 percent of all gasoline in 1980 was distributed through jobbers. Assuming, for simplicity, the percentage of product distributed through jobbers to be the same for all petroleum products, about $490 million of the overcharges passed through the hands of jobbers. Assuming that jobbers (as a class) absorbed four percent of the overcharges that were passed on to them by their refiner-suppliers, the total amount absorbed by jobbers (as a class) would be about $19 million. Distributing this to all 24 thousand jobbers yields an average refund of about $800. Of course, the members of the jobber population will have changed substantially in the five years since decontrol, presenting yet further difficulties.

would be no tracing. Because the violation occurred years ago, many who were customers then will not be now. Conversely, many who would receive refunds now were not injured because they were not customers then.

This analysis leads DOE to the conclusion that the econometric modeling method of indirect restitution described by the OHA is neither compelled nor desirable. It is too inexact in determining injury to particular classes of claimants and yields no conclusions concerning the injury to individuals within any class. The governmental costs in resources and, more importantly, societal costs in years of continued litigation prior to distribution are unacceptably high. Moreover, the few instances in which it may be possible to make refunds that do not depend upon the econometric method are exceptions to the general rule. These exceptions, representing, as they do, only a small percentage of the overcharges, should not become the focus of DOE's and the court's restitutionary efforts in this case at the expense of the vast population of overcharged consumers.

In view of these conclusions, and because of the enormous amounts at issue in this and similar cases, DOE recommends that the stripper well overcharge monies be maintained in the escrow account to afford the Congress of the United States ample opportunity to select the means for making indirect restitution in crude oil cases like this where the entitlements program spread the effects of the overcharges nationwide and where it is impossible to trace the overcharges and make direct restitution to the specific persons injured by them. Indeed, both the Senate and the House of Representatives have, in the Budget Resolutions that each have passed, provided for the use of these and other petroleum overcharge funds that cannot be traced and refunded to specific overcharged persons (as is the case here) to fund programs aiding all citizens. Specifically, they would be used for federally funded programs, in substitution for other funds which would then be available for general

appropriations or deficit reductions. Such legislation would provide a more systematic and predictable disbursement of the monies than continued independent decisions in DOE's many enforcement cases. The appropriations process was similarly used in 1982 as a vehicle for distributing oil overcharge monies under the Warner Amendment.[5]

Further Continuing Appropriations Act, Pub. L. No. 97-377, Section 155, 96 Stat. 1830, 1919 (1982).

The public policy decision as to the best means of providing indirect restitution to the general public should be made by the Congress on a uniform basis. Moreover, clear congressional guidance would reduce, if not eliminate, time-consuming and costly litigation over appropriate remedies.

If Congress does not enact legislation providing a specific means for distribution of these monies by the end of the next session (*i.e.*, the Fall of 1986) then the most effective means of making indirect restitution to the whole population, over which virtually all of the overcharges were spread, is through the government. This conclusion is consistent with the results reached by the district courts in the *Exxon* and *Sutton* cases and with the congressional will as evidenced in the Warner Amendment. More specifically, the monies should be paid to the general fund of the U.S. Treasury. As the Temporary Emergency Court of Appeals recently explained, payment to the general fund is a lawful and appropriate method of providing indirect restitution since "it will benefit the public." *Payne 22, Inc.* v. *United States*, No. DC-102 (TECA March 29, 1985). By reducing the Federal deficit, it tends to offset the nationwide inflationary impact of the original violation, thus benefiting the economy and citizens generally. This

5. The Administration also has formally submitted to the Congress a draft bill, the Petroleum Overcharge Restitution Act, to resolve the restitution issue that is independent of the adopted Budget Resolutions.

restitutionary nexus was also recognized by this court in its referral order:

A direct refund to the United State Treasury would serve equitable and restitutionary goals. While such a remedy would not aid energy consumers as directly as refund to the states for use in energy programs, it would have certain advantages. It would involve virtually no adminstrative expense and would benefit the public at large by increasing federal revenues.

In re: The Department of Energy Stripper Well Exemption Litigation, 578 F.Supp at 595.

This approach is preferred to further *ad hoc* distribution to the states. If there is no legislation, the states, as a result of the decisions in *Exxon* and *Sutton*, will receive more than two billion dollars for use in certain federally-established energy programs. The Department of Energy, which is responsible for administering and overseeing most of these programs at the federal level, has concluded that the states cannot make effective use of additional monies (beyond those appropriated by Congress and awarded by the *Exxon* and *Sutton* courts) for these programs at this time. The need for the reduction in the federal deficit that would result from payment of these overcharges into the Treasury is well known, as is the benefit to all Americans that would result.

Dated: June 21, 1985.

Danny J. Boggs,

Deputy Secretary.

[FR Doc. 85-15855 Filed 7-1-85; 8:45 am]

Office of Hearings and Appeals

Order Implementing Departmental Policy Regarding Crude Oil Overcharges

Today, the Department of Energy (DOE) filed with the United States District Court for the District of Kansas its policy statement concerning the distribution of the funds in escrow representing overcharges in the *Department of Energy Stripper Well Exemption Litigation*, M.D.L. 378, based on the factual findings made by this office which are simultaneously being submitted to the court. In light of these findings, DOE in its policy statement is recommending that the stripper well overcharges be placed in escrow to afford the Congress of the United States the opportunity to select the means of making indirect restitution. Alternatively, should Congress decline to act on the issue, DOE's policy will be that the monies should be paid to the general fund of the United States Treasury, for the benefit of all Americans.

The decision to place the overcharge funds in escrow pending Congressional action is now DOE policy. In the *Stripper Well Exemption* proceeding, of course, this office was acting solely as a finder of fact under the orders of the Kansas court, and the companion DOE policy statement is a recommendation to that court. However, as to the other overcharge funds representing entitlements-periods crude oil miscertification violations being administered under the authority of 10 CFR Part 205, Subpart V, this office will apply that policy to refund proceedings involving those funds.

We are also announcing today that another previously-enunciated DOE policy now will be implemented by its own terms as a result of the factual findings made by this office. On January 9, 1985, DOE decided that, in view of the determination not to publish

any further entitlements notices, those refiners with adjudicated final "receive orders" arising from the entitlements programs would be funded from overcharge money "[i]f OHA determines that a portion of [this] money corresponds to injury to refiners as a class. . . ." 50 FR 1919, 1921 (January 14, 1985). We have found in the stripper well proceeding that refiners, as a class, absorbed some part of crude oil overcharges.

The economic effects of the entitlements program were felt by all levels of the petroleum distribution chain during price controls. The economic incidence of net reductions in entitlements obligations as a result of exception relief during the program was identical to the incidence of crude oil overcharges during the program. Therefore, DOE has determined that it would be fair to use an appropriate portion of crude oil overcharge funds as a meands to implement relief "to firms with adjudicated hardship." *Id.*

In view of the foregoing, any holder of a finally adjudicated entitlements receive order must, within 30 days of publication of this Order in the **Federal Register**, apply to this office for payment in accordance with that order. Moreover, any person alleging that it is adversely affected by this order must file any objection within 30 days.[1] Any person who subsequently receives a final adjudicated receive order will have 30 days from the date of the order to make an application for payment.

Dated: June 21, 1985.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 85-15854 Filed 7-1-85; 8:45 am]

---

1. Because of the litigation concerning the entitlements program, *Texaco Inc.* v. *DOE*, TECA Nos. 3-44 through 49, any payment pursuant to this order will be placed in an interest-bearing escrow account pending the outcome of that litigation.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	
ROBERT B. SUTTON	:	
SUTTON INVESTMENTS, INC.;	:	
BPM, LIMITED;	:	No. 82-C-1069-B
SCURRY OIL COMPANY;	:	
SOONER REFINING COMPANY, INC.;	:	
and WILLIAM D. SANDOZ,	:	
as Trustee for Sooner	:	
Refining Company, Inc.	:	

MOTION FOR MODIFICATION OF REMEDY

Plaintiff United States of America moves this Court to modify the distribution formula and the limitations placed on the use of the restitutionary funds by the States. Specifically, the United States requests (1) that the States be permitted to use the monies received for any of the three energy programs identified in the proposed Petroleum Overcharges Restitution Act, H.R. 4972, and (2) that the monies be distributed to the States in proportion to the volumes of refined products consumed in each during the period of price controls.

Respectfully submitted,

s/Thomas C. Newkirk

THOMAS C. NEWKIRK
LARRY P. ELLSWORTH
JEROME WIENER
MARCIA K. SOWLES
U.S. Department of Energy
Office of General Counsel
1000 Independence Ave., S.W.
Room 6H-034
Washington, D.C. 20585

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	
ROBERT B. SUTTON	:	
SUTTON INVESTMENTS, INC.;	:	
BPM, LIMITED;	:	No. 82-C-1069-B
SCURRY OIL COMPANY;	:	
SOONER REFINING COMPANY, INC.;	:	
and WILLIAM D. SANDOZ,	:	
as Trustee for Sooner	:	
Refining Company, Inc.	:	

MEMORANDUM IN SUPPORT OF MOTION FOR MODIFICATION OF REMEDY

One of the most difficult problems facing courts and the Department of Energy (DOE) in energy litigation is what remedy to adopt for large crude oil violations, the consequences of which were spread throughout the economy as a result of the automatic workings of the Entitlements Program, 10 C.F.R. §211.67, and cost pass-through provisions of the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. §§212.83(c)-(d), 212,93(a), 212.183(c). Both the courts and the agency have previously employed a variety of indirect restitutionary remedies, including various types of payments to the U.S. Government and to state governments, to rectify the injuries suffered by American consumers. After much study of this problem, the DOE has developed what it believes is the most desirable approach to assure a fair and uniform remedy in such situations and has proposed legislation to implement this approach. Petroleum Overcharge Restitution Act, H.R. 4972 (Attachment A). Under the proposal restitution would be made to the states for the benefit of their citizens under any of three specified energy programs. This proposed legislation is similar in some respects to earlier legislation (the

Warner Amendment), which required $200,000,000 in restitutionary funds to be paid to the states for use in specific energy programs, including these same three. Section 155 of the Continuing Appropriations Act for the Fiscal Year 1983, Pub. L. 97-377, 96 Stat. 1919.

The Department's legislative initiative and the Warner Amendment differ in two important ways from the remedy ordered by the Court in this case. First, the Warner Amendment provides for distribution to the states based upon petroleum consumption within the states during the period of controls. This ties the payments to the actual injuries suffered by the citizens of each state. Second, the Department's proposed legislation requires the states to use the funds for three energy-related programs. These programs help to reduce energy demand and costs by weatherizing public buildings, finding cheaper alternative energy sources for schools and hospitals, promoting energy conservation, and by generally tempering increased energy costs for those most in need. In short, these programs generally benefit the energy consumers who were harmed by defendants' misconduct.

The department respectfully recommends that the court consider modifying the remedy in this case to conform to these legislative initiatives. The Department believes that adoption of this suggestion would result in an improved restitutionary vehicle because the approach taken in the proposed Petroleum Overcharge Restitution Act provides a uniform and efficient method for distributing overcharges where, as here, the victims of the overcharges cannot be identified. The proposed legislation provides that the funds be used in three existing energy programs.[1] Using the moneys for these three ear-

---

1. Weatherization of public buildings under Part A of the Existing Buildings Act of 1976 (42 U.S.C. §6861 *et seq.*); energy conservation programs for schools and hospitals under Part G of Title III of the Energy Policy and Conservation Act (42 U.S.C. §6371 *et seq.*);

marked programs would have two advantages. First, it would insure consistency with distribution in other cases. Second, this modification would provide the states with the flexibility to allocate the funds among the three programs to meet the particular needs of their citizens, while assuring that the restitutionary moneys be used in energy programs established by Congress.

As one district court explained in making restitution for crude oil overcharges by providing funds to the States for use in federally-established energy programs;

> The purpose of domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs. The . . . energy conservation programs . . . operate across the nation to reduce the same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need.[2]

The United States also requests that this court give consideration to an alternative formula for distributing the moneys to the states. Instead of distributing the funds on the basis of population, previous distributions have been made on the basis of the volume of refined petroleum products consumed in each state.[3] tying dis-

---

and financial assistance for low income families under the Low Income Home Energy Assistance Act of 1981 (42 U.S.C. §8621 *et seq.*).

2. *United States v. Exxon Corp.*, 561 F. Supp. 816, 856-57 (D.D.C. 1983), *appeals docketed*, Nos. DC-91 *et al.* (TECA July 6, 1983). In that case, the district court directed that funds be used for the five energy-related programs identified in the Warner Amendment. The three programs which are encompassed in the proposed legislation are the three of the five Warner Amendment programs which the Department believes can make the most effective use of the funds.

3. Attachment B compares the percentage of the restitutionary funds each state would receive based on consumption of refined products by its citizens with the percentage each state would receive based on population.

tribution to consumption in this manner insures that "the moneys be spent in a manner which bears some resemblance to the harm," 121 Cong. Rec. S15115 (Dec. 16, 1982) (Statement by Senator Warner).[4] This is the approach the DOE has used in various special refund proceedings before the agency. *See, e.g., Standard Oil Company (Indiana),* 11 DOE ¶85,185, at 88,301 (1983); *Belridge Oil Co.,* 11 DOE ¶85,197, at 88,331 (1983); *Palo Pinto Oil & Gas Co.;* 11 DOE ¶85,034, at 88,048 (1983).

For the above reasons, the United States suggests that the court consider modification of the remedy to direct that the moneys be distributed to the states for use in the three specified energy programs based on the historical consumption of petroleum products in each state. A copy of a proposed judgment incorporating these modifications is enclosed as Attachment C.

Respectfully submitted,

THOMAS C. NEWKIRK
LARRY P. ELLSWORTH
JEROME WIENER
MARCIA K. SOWLES
U.S. Department of Energy
Office of General Counsel
1000 Independence Ave., S.W.
Room 6H034
Washington, D.C. 20585

4. The Warner Amendment provided that:

> The disbursement by the Secretary of Energy to each State shall be based on the ratio calculated by the Secretary which
>
> (i) the volume of refined petroleum products consumed within that State during the period beginning September 1, 1973, and ending January 28, 1981, bears to
>
> (2) the volume of refined petroleum products consumed within all states during such period.

This approach was also used in *United States v. Exxon, supra.*

ATTACHMENT A

98TH CONGRESS
2D SESSION
H.R. 4972

To provide for distribution to the States of certain amounts resulting from enforcement of the Emergency Petroleum Allocation Act of 1973, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

February 29, 1984

Mr. BROYHILL (for himself and Mr. CORCORAN) (by request) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

A BILL

To provide for distribution to the States of certain amounts resulting from enforcement of the Emergency Petroleum Allocation Act of 1973, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That this Act may be cited as the "Petroleum Overcharge Restitution Act".

OVERCHARGE DISTRIBUTION PROCEDURES

SEC. 2. (a) In the manner provided by this Act, the Secretary of Energy shall distribute the following restitutionary amounts—

(1) amounts held in escrow on the date of enactment of this Act, and

(2) amounts received after the date of enactment of this Act,

which are held or received as a result of a settlement, order, or judgment (including a declaratory judgment) involving overcharges resulting from alleged petroleum pricing violations under the Emergency Petroleum Allocation Act of 1973.

(b) A settlement, order, or judgment described in subsection (a) that includes restitutionary amounts shall be referred to the Secretary of Energy who shall conduct a proceeding for the purpose of identifying and making restitution to persons who the Secretary determines sustained economic injury; however, in cases in which an administrative or judicial order or judgment entered before the date of enactment of this Act rests upon a determination that it is impossible or impractical to identify or to make direct restitution to the persons who sustained economic injury, a proceeding shall not be conducted under this subsection, and the restitutionary amounts not yet paid and distributed shall be deposited in the Fund established by section 3(a) of this Act.

(c) In cases in which a court has rendered or renders a judgment in favor of the Government for petroleum pricing violations under the Emergency Allocation Act of 1973, the court shall order that any restitutionary amounts (including interest) not yet paid and distributed be paid to the Department of Energy to be held in escrow pending distribution in accordance with this Act.

(d) While the Department of Energy holds amounts in escrow pending the completion of the proceedings required by this section, the Secretary of Energy may place a portion of those amounts that the Secretary considers appropriate in the Department's minority-owned financial institution depository program.

PETROLEUM OVERCHARGE RESTITUTION FUND

SEC. 3. (a) There is established in the treasury of the United States a fund to be known as the Petroleum Overcharge Restitution Fund (referred to in this Act as the "Fund").

(b) There shall be deposited in the Fund restitutionary amounts described in section 2 of this Act that the Secretary of Energy determines—

(1) exceed amounts needed for refunds to persons who sustained economic injury from overcharges; or

(2) cannot be refunded to persons who sustained economic injury because they cannot reasonably be identified, or because the amount of injury such persons sustained cannot reasonably be determined or is so small that distribution is not reasonably feasible.

(c) Deposits into the Fund shall be made as soon as practicable after completion of the proceeding under section two of this Act, or as otherwise provided by this Act; however, escrow amounts that have been invested shall be deposited in the Fund in a manner that avoids the payment of penalties for premature withdrawal.

(d) When appropriations are made for a program listed in section 4 of this Act, the amount provided shall be derived from the Fund to the extent that amounts are available in the Fund. If amounts in the Fund are not sufficient to cover the appropriation made for such a program, the remaining amounts shall be derived from the general fund of the Treasury and shall be returned to the general fund to the extent that amounts become available in the Fund.

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. For each of the fiscal years 1985 through 1989 there is authorized to be appropriated for carrying out

(i) Part A of the Energy Conservation in Existing Buildings Act of 1976 (42 U.S.C. 6861-6873),

(ii) Part G of title III of the Energy Policy and Conservation Act (42 U.S.C. 6371-6371j), and

(iii) the Low Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621-8629)

amounts that do not exceed the amount appropriated in fiscal year 1984 by Public Law 98-146 for the programs in clauses (i) and (ii) and by Public Law 98-139 for the program in clause (iii). Amounts appropriated pursuant to this section may be made without fiscal year limitation.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION

FRANCIS X. BELLOTTI
Attorney General
of Massachusetts
GEORGE B. DEAN
ALAN L. KOVACS
One Ashburton Place—
20th Floor
Boston, Massachusetts 02108

DAVID FROHNMAYER
Attorney General of Oregon
DONALD C. ARNOLD
100 State Office Building
Salem, Oregon 43710

JOHN VAN DE KAMP
Attorney General of California
YEORYIOS C. APALLAS
6000 State Building
350 McAllister
San Francisco, California 94102

ANDREW P. MILLER
GEORGE KAUFMANN
STEPHAN G. WIELGOZ
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

BERNARD NASH
EDWARD G. MODELL
BLUM, NASH & RAILSBACK
1133 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 857-0220

JAMES F. FLUG
PAULA DINERSTEIN
LOBEL, NOVINS & LAMONT
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

December 23, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under § 209 of the Economic Stabilization Act of 1970, as amended, in formulating a remedy for overcharges modeled on previous restitutionary legislation, where the spreading of the consequences of the violation to consumers throughout the economy made it impossible to determine the injuries of individual victims?

2. Do any of the petitioners raise a substantial question that the District Court erroneously denied them any procedural right?

LIST OF JURISDICTIONS JOINING IN THIS BRIEF

We accept the listing of parties below as set forth in the respective petitions; however, we here specifically list the jurisdictions which join in this brief.

Alabama
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Georgia
Guam
Hawaii
Idaho
Illinois
Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
South Dakota [1]
Tennessee
Texas
Utah
Vermont
Virgin Islands
Virginia
West Virginia
Wisconsin
Wyoming

---

[1] South Dakota joins in the brief as *amicus curiae* pursuant to Rule 36.4 of this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF JURISDICTIONS JOINING IN THIS BRIEF	ii
COUNTERSTATEMENT OF THE CASE	1
A. The Regulatory Program	3
B. The Proceedings Below	5
1. The District Court	5
2. The Court of Appeals	9
REASONS FOR DENYING THE PETITIONS	12
I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT	14
A. Because Section 209 of the ESA Vested the District Court with Broad Equitable Powers, the Scope of "Appellate Review is Correspondingly Narrow"	14
B. The Remedy Chosen by the District Court Was Well-Grounded in Fact and Law	15
1. The Record and Regulatory Scheme Made It Clear That It Was Impossible to Trace the Impact of Exxon's Overcharges to Individual Victims	15
2. The Restitutionary Remedy Selected by the District Court Was Equitable, Fair and Reasonable	18
3. TECA's Decision Is Entirely Consistent With This Court's Decisions	22
II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Adams Resources and Energy, Inc., 9 DOE ¶ 82,553 (1982) 19
Alfred B. Alkek, 9 DOE ¶ 82,521 (1982) 19
Cities Service Co. v. *FEA*, 529 F.2d 1016 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) 5, 7
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717 (Em. App.), *cert. denied*, 459 U.S. 877 (1982) 14, 22, 25
Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan.) 16
Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) 24
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) 27
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 20
Hodgson v. *United Mine Workers*, 153 U.S. App. D.C. 407, 473 F.2d 118 (1972) 29
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) ... 27
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 15
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 14, 15, 20
NAACP v. *New York*, 413 U.S. 345 (1973) 29
Pellegrino v. *Nesbit*, 203 F.2d 463 (9th Cir. 1953) .. 29
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 14, 15, 20, 22-23
Sauder v. *DOE*, 648 F.2d 1341 (Em. App. 1981) 14, 22
Smuck v. *Hobson*, 132 U.S. App. D.C. 372, 408 F.2d 175 (1969) 29
Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 22
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 (1982) 12
Tumey v. *Ohio*, 273 U.S. 510 (1927) 18
Union Oil Co. v. *DOE*, 688 F.2d 797 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983) 5, 7
United Airlines, Inc. v. *McDonald*, 432 U.S. 385 (1977) 29
United States v. *Leib*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) 22
Wolpe v. *Poretsky*, 70 U.S. App. D.C. 141, 144 F.2d 505, *cert. denied*, 323 U.S. 777 (1944) 29

TABLE OF AUTHORITIES—Continued

UNITED STATES CONSTITUTION	Page
Fifth Amendment	25
STATUTES	
Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note	
§ 209	1, 2, 5, 7, 9, 11, 14
§ 210	11
§ 211	2
Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 *et seq.*	3, 4
15 U.S.C. § 753(b) (2)	3
15 U.S.C. § 753(b) (2) (A)	4
15 U.S.C. § 754(a) (1)	2
Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 (repealed 1946)	
§ 205(a)	14, 22
§ 205(e)	22
Energy Conservation and Existing Buildings Act of 1976, Part A, 42 U.S.C. § 6861 *et seq.*	20
Energy Policy and Conservation Act, Part D of Title III, 42 U.S.C. § 6321 *et seq.*	20
§ 6322(a) (1)	21
§ 6322(c)	21
§ 6322(d) (5)	21
Energy Policy and Conservation Act, Part G of Title III, U.S.C. 42 U.S.C. § 6371 *et seq.*	20
Further Continuing Appropriations Act 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1919 § 155 (1982)	8, 9, 18-22
Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621 *et seq.*	21
National Energy Extension Service Act, 42 U.S.C. § 7001 *et seq.*	20
§ 7004(b) (6)	21
§ 7004(b) (7)	21
§ 7005(h)	21

TABLE OF AUTHORITIES—Continued

COURT RULES Page

Rules of the Supreme Court of the United States

Rule 17 12
Rule 36.4 ii

Federal Rules of Civil Procedure

Rule 24 25
Rule 24(a) 28, 29
Rule 24(b) 29
Rule 56 ..... 25, 28

REGULATIONS AND PROPOSED REGULATIONS

Executive Order No. 12287, 46 Fed. Reg. 9909..... 4

Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. §~~211~~ *et seq.* (1984)

§ 211.67 ..... 4, 5, 7, 9, 10
Part 212, Subparts F and L 7
§ 212.83(c) 10
§ 212.83(c)(2)(iii) 7
§ 212.83(d) 10
§ 212.93(a) 10
Energy Measures and Energy Audits, 10 C.F.R. Part 450 (1985) 21

Mandatory Petroleum Products Allocation and Procedural Regulations, 39 Fed. Reg. 1924 (1974) 4

Allocation of Old Oil, 39 Fed. Reg. 31650 (1974), *reprinted in* Energy Mgmt. (CCH), Proposed Regulations 1974-1978, ¶ 12,526 4

LEGISLATIVE MATERIALS

128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982).... 19
128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982).... 18
128 Cong. Rec. S15117 (daily ed. Dec. 16, 1982).... 20
128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982).... 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-429, 85-430, 85-432, 85-440 and 85-444

EXXON CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

---

BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION [1]

COUNTERSTATEMENT OF THE CASE

This is an action brought by the United States under § 209 of the Economic Stabilization Act of 1970 ("ESA"),

---

[1] This brief is filed on behalf of the States and other jurisdictions listed on p. ii, *supra*. Although we maintain that the courts below correctly resolved all questions of liability (including amount) in favor of the United States and against the Exxon Corporation ("Exxon"), because of the limited scope of the intervention which we were granted below, this brief does not respond to Exxon's petition for certiorari (No. 85-429), which presents no question concerning the distribution of the amounts for which Exxon was held liable.

The opinions below will be cited to the Appendix to the Exxon petition ("Exx. App.").

as amended,[2] against Exxon Corporation, alleging that the prices Exxon charged beginning in January 1975 for crude oil produced from the Hawkins Field Unit ("HFU") in Texas exceeded the maximum prices permitted by law. The District Court found in favor of the United States on the issue of liability. In fashioning an equitable remedy under § 209, the District Court accepted the Government's contention that, "[d]ue to the pervasive reach of oil price regulation at the time these overcharges occurred, . . . the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products*," [3] and ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [4], to be held in trust for immediate redistribution to the States [5] in proportion to each State's share of nationwide consumption of petroleum products, for expenditures on energy-related programs designed to benefit their injured citizens.[6] TECA, which has exclusive appellate jurisdiction in all ESA and EPAA matters (see ESA § 211), affirmed the District Court's Order.

Four petitions for certiorari, in addition to that of Exxon, have been filed by intervenor-parties at virtually every level of distribution and use of petroleum products,

---

[2] 12 U.S.C. § 1904 note, as incorporated by § 5(c)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 754(a)(1). In relevant part, § 209 of the ESA provides that a court may "order restitution of moneys received in violation of any . . . order or regulation [under this Title]."

[3] Exx. App. 239a (emphasis added).

[4] Exx. App. 254a.

[5] As used herein, the term "States" refers to all fifty States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands.

[6] Exx. App. 255a-256a.

from refiners to an individual motorist.[7] All challenge the District Court's restitutionary order and contend that awards should instead have been made to them (and to the classes which some purport to represent).

A. The Regulatory Program

The District Court's Order and TECA's affirmance rest squarely on the regulatory program which these decisions implement: we therefore begin by describing that program.

The EPAA, 15 U.S.C. § 751 *et seq.*, directed the President to promulgate regulations implementing price and allocation controls on petroleum and petroleum products, and further directed, in relevant part, that:

> [i]n specifying prices (or prescribing the manner for determining them), the regulation shall provide for (A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level . . . [EPAA, § 4(b)(2), 15 U.S.C. § 753(b)(2)]

"Passthrough" is the key word in this passage and the cornerstone of the implementing regulations. From their

---

[7] The four petitions were filed by: Marathon Petroleum Company, Mobil Oil Corporation, Murphy Oil Corporation, Ashland Oil, Inc., Pennzoil Company, Tenneco Oil Company, and Tosco Corporation (collectively "Marathon") (No. 85-430); Air Transport Association of America, Petroleum Marketers Association of America, The Jobbers' Group, and Independent Gasoline Retailers (collectively "ATA") (No. 85-432); Philadelphia Electric Company ("PECO") (No. 84-440); and National Freight Inc., RJG Cab Co. Inc., and Geraldine H. Sweeney (collectively "National Freight") (No. 85-444). These petitions and their appendices are referred to hereafter, respectively, as, "Mar. Pet." and "Mar. App.", "ATA Pet." and "ATA App.", "PECO Pet." and "PECO App.", and "Nat. Frt. Pet." and "Nat. Frt. App." The 45-volume Record of proceedings in the District Court as filed in the TECA will be referred to by volume number and page number as "— R. —."

adoption on January 14, 1974,[8] until all petroleum products were decontrolled on January 28, 1981,[9] the regulations promulgated pursuant to the EPAA permitted refiners, crude oil resellers and petroleum product resellers to pass through to their customers their net increases in crude oil costs for refined petroleum products, together with their increased costs of purchased refined products and certain "non-product" costs.[10] On August 30, 1974, the Department of Energy's ("DOE") predecessor agency, the Federal Energy Administration ("FEA"), published a Notice of Proposed Rulemaking concerning the Old Oil Allocation ("Entitlements") Program.[11] FEA stated that "[t]he objective of the entitlements program proposed is to achieve the equitable distribution of the low priced old oil among all sectors of the petroleum industry . . . ." (39 *Fed. Reg.* at 31650). FEA also commented that "[u]nder the proposal, all money spent or received as the result of the purchase or sale of entitlements would be passed through to consumers, either as a cost increase or decrease, respectively." (*Id.*).

Effective November 29, 1974, FEA adopted regulations instituting the Entitlements Program.[12] In keeping with the Congressional mandate that there be "dollar-for-dollar passthrough of the net increases in the cost of crude oil," 15 U.S.C. § 753(b)(2)(A), the regulations provided that the entitlements costs or proceeds would be included in crude oil cost calculations. In upholding the constitutionality and validity of the Entitlements Program, TECA explained:

> The basic purpose of the Entitlements Program was to spread the benefit of access to old price-con rolled

---

[8] *See* 39 *Fed. Reg.* 1924 (1974).

[9] *See* Exec. Order No. 12287; 46 *Fed. Reg.* 9909 (1981).

[10] *See* 10 C.F.R. § 212.83(c) and (d).

[11] *See* 39 *Fed. Reg.* 31650 (1974).

[12] *See* 10 C.F.R. § 211.67 (1974).

> oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, *all regions of the country, and among all consumers of petroleum products. . . .*[13]

As TECA stated in its opinion herein, one consequence of the Entitlements Program was that if, as happened here, price-controlled crude was improperly certified as exempt (or higher priced) crude oil, the effects of the overcharges initially would be distributed among all domestic refiners; thereupon "the regulatory system was designed to insure that money spent or received by the refiners as the result of their purchases or sales of entitlements would be passed along to the ultimate consumers." [14]

B. The Proceedings Below

1. *The District Court*

On June 8, 1978, DOE instituted this enforcement action against Exxon under § 209 of the ESA, alleging that the prices Exxon had been charging since January 1975 for crude oil produced from the HFU exceeded the maximum prices permitted by law. (I R. 16). In its prayer for relief, DOE urged the District Court to order Exxon to pay the overcharges, with interest, to the United States Treasury.[15] Over the ensuing 4 years, the District Court issued 8 reported opinions and over 100 separate

---

[13] *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Em. App. 1975), *cert. denied*, 426 U.S. 947 (1976) (emphasis added).

[14] Exx. App. 87a, citing *Union Oil Co.* v. *DOE*, 688 F.2d 797, 802 (Em. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). See also the decision of the District Court herein quoted at p. 7, *infra*.

[15] "Plaintiff prays that this Court enter judgment in its favor upon this Complaint: . . . 3. Ordering that Exxon make restitution of moneys, in the form of payments to the United States Treasury, equal to the amount of its overpricing for first sales of crude oil from the [Hawkins Field Unit];" (I R. 33).

orders, and TECA issued 3 reported opinions on interlocutory appeals brought by Exxon.

On August 27, 1982, DOE and Exxon filed cross-motions for summary judgment presenting both liability and remedy issues for decision. On November 24, 1982, five weeks *after* oral argument on the summary judgment, a group of 6 refiners, including 4 of the 7 petitioners in No. 85-430, and a trade association representing other refiners ("Indicated Refiners") filed a "Conditional Motion . . . To Intervene" in which they argued, as Exxon had, that "it is impossible to trace the impact of the overcharges," and that, based upon precedent in private antitrust damage actions, refiners should receive the entire overcharge fund (XLV R. 38973). Some three months *after* oral argument, 5 gasoline station operators ("Gasoline Retailers"), purporting to represent 187,000 independent branded retailers throughout the United States, filed a motion for limited intervention in the District Court; they urged that the "impact of the overcharge" should be traced through the DOE Entitlements Program to the "more than 200 refiners nationwide" and then, "taking into account each refiner's banked costs" and DOE's "[c]omprehensive compliance audits", to all "purchasers of refined products throughout the period of violation" (XLV R. 38995-38997). At Exxon's request, the District Court stayed consideration of both the Indicated Refiners' and the Gasoline Retailers' intervention motions. (ATA App. A-288 and A-289.)

On March 25, 1983, the District Court issued its Memorandum Opinion holding Exxon liable for some $895 million in crude oil overcharges between January 1975 and January 1981, plus interest. The District Court determined that, as a matter of law, Exxon was required to change its accounting practices relating to Hawkins Field crude oil on January 1, 1975, and that there was no factual dispute as to its failure to do so.

In fashioning an equitable remedy under § 209 of the ESA, the District Court determined that "the overcharges worked their way throughout the economy nationwide to the *millions of ultimate consumers of petroleum products.*" [16] Following TECA's prior holding concerning the operation of the Entitlements Program, the District Court reasoned that "[j]ust as the program spread the benefit of access to old oil, so too did the program spread the burden of Exxon's overcharges among all sectors of the petroleum industry, all regions, and all consumers [of petroleum products]." [17] The District Court also referred to record evidence of Exxon's admitted understanding of this impact [18] as well as the cost-passthrough effects of DOE's price regulations.[19] It determined:

> Exxon's overcharges were not, as it simplistically asserts, borne by Exxon itself, but instead were borne by ultimate consumers of petroleum products throughout the entire country.[20]

Accordingly, the District Court found that:

> [t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each.[21]

---

[16] Exx. App. 239a (emphasis added).

[17] Exx. App. at 248a, citing *Cities Service Co.* v. *FEA*, p. 5 n.13, *supra*. *See also id.* at 248a-249a, quoting *Union Oil Co.* v. *DOE*, *supra*, p. 5, n.14.

[18] Exx. App. 248a-249a.

[19] Exx. App. 249a, citing 10 C.F.R. § 212.83(c)(2)(iii) and 10 C.F.R., Part 212, Subparts F and L.

[20] Exx. App. 249a. Based on this finding, the District Court initially denied the conditional intervention motion of the Indicated Refiners and the motion for limited intervention of the Gasoline Retailers. Exx. App. 249a, n.56.

[21] Exx. App. 250a.

The District Court ordered Exxon "to make restitution of the full amount of the overcharges, plus interest, to the [United States] Treasury" [22] to be held "in trust" [23] for distribution to the States, in proportion to each State's share of nationwide consumption of petroleum products, for use in energy-related programs designed to benefit their injured citizens.[24] The procedures for disbursement to the States were modeled on the Congressional enactment of § 155 of the Further Continuing Appropriations Act, 1983.[25] The District Court explained:

> *In formulating its order, the court in no way relies on Section 155 as an express statutory grant of authority to this court, but acts instead in the exercise of its broad equitable powers to order restitution.* However, Section 155 clearly bespeaks the intent of Congress that violators of the petroleum price regulations should be made to disgorge their illgotten gains even in situations, like the case before the court, where the victims of the petroleum overcharges cannot be identified. The colossal scale of Exxon's wrongdoing, and the workings of pervasive regulations to spread the burden of that wrongdoing impossibly far and wide, must not deter this court from fashioning an appropriate equitable remedy. The purpose of the domestic petroleum price regulations was to keep oil prices down, to relieve consumers of some of the burden of towering oil costs.

---

[22] Exx. App. 254a.

[23] District Court Judgment, XXXV R. 31658 at 31659.

[24] Exx. App. 255a-256a. The programs are listed *infra* at p. 20, n.41.

[25] Pub. L. No. 97-377, 96 Stat. 1830, 1919, § 155 (1982) ("Warner Amendment" or the "Amendment"), reproduced at ATA App. A-316. In the Warner Amendment, Congress directed the Secretary of Energy to distribute up to $200 million in escrowed overcharge funds for energy related uses by the States in proportion to the relative consumption of both price-controlled and uncontrolled petroleum products in each State during the period in which price controls were in effect.

> The five energy conservation programs identified in Section 155 operate across the nation to reduce that same burden, either by reducing overall consumption through conservation or by direct financial assistance to those most in need. *Although one might speculate as to alternative remedies, this court respects the wisdom of the solution chosen by Congress and shall adopt it as the most appropriate equitable remedy in the circumstances of this case.* [Exx. App. 256a, footnote omitted, emphasis added.]

Thereafter 33 States and Territories and the District of Columbia were allowed to intervene to support the District Court's restitution order on appeal.[26] Six additional separate motions to intervene were filed by a joint total of 14 parties, including refiners, jobbers, utilities, a trucking company, a taxicab company, and an individual motorist. Each of these motions sought only to intervene for purposes of appeal. None moved the District Court to reopen the record on the question of the feasibility of tracing the effect of the overcharges or for a hearing on or reconsideration of any issue. The District Court granted all applications for intervention, including on reconsideration those of the Indicated Refiners and the Gasoline Retailers, for the purpose of arguing the remedy issue on appeal. (*See* ATA App. A-290 through A-298).

2. *The Court of Appeals*

On appeal, TECA unanimously affirmed the judgment of liability against Exxon. By a 2-1 vote, TECA also affirmed the District Court's remedy under § 209.

TECA rejected the contention "that the trial court was required to trace, or attempt to trace, the overcharges from first purchaser, to refiner, through various monthly accountings required by the Entitlements Program and its 'banking' system, and then to determine the nature

---

[26] Subsequently, 12 additional States intervened for the same purpose before TECA.

and extent of any passthrough of increased costs through the distribution system, such as might be authorized by 10 C.F.R. Section 212.83(c)-(d) (refiners) and 212.93(a) (resellers and retailers)." (Exx. App. 85a). TECA agreed with the District Court that:

> any attempt to trace the overcharges would be doomed to failure because of the pervasive influence of the Entitlements Program and other regulations which had the effect of passing on and diffusing the HFU overcharges through the distribution system. [Exx. App. 86a-87a.]

TECA explained the consequences of the Entitlements Program whereby overcharges would be passed along to the ultimate consumers (Exx. App. 87a; *see* pp. 3 to 5, *supra*) and continued:

> We agree with the trial court's conclusion that any attempt to trace increased costs attributable to the HFU overcharges would require a full scale audit of the entire petroleum industry, and that any effort to do so would be futile. As the Government suggests, the first step in any such audit would require recalculating over seventy monthly entitlement lists issued during the period of the overcharges, taking into account such variables as the volumes of new and old oil produced during each month, the average acquisition costs, and the values of each entitlement. In determining the precise impact of the overcharges on any particular refiner, it would then be necessary to consider the impact of exception relief which may have been granted by the agency over the term of the Entitlements Program.
>
> * * *
>
> Even if the HFU overcharges could be traced to individual refiners, it would then be necessary to trace their effect on product resellers, retailers and consumers, through the provisions of passthrough regulations. That this task would be futile is illustrated by the difficulty of applying only one aspect of the regulations, that is, the calculation of "banked

> costs." Exxon itself admitted that it was unable to supply information on its own costs. . . .
>
> * * *
>
> The fact that banked costs might exist as to any particular refiner does not mean of course that increased costs were not passed on through the distribution system. To determine this would require an investigation into the state of mind of each refiner in setting prices for individual petroleum products each month. Such a task would be impossible, and several of the intervenors have so conceded. [Exx. App. 88a-90a.]

TECA rejected the refiners' suggestion "that refunds be made payable to themselves as 'first purchasers' [because] that would result in inequities, inconsistent with the fundamental purpose of restitution under Section 209." (Exx. App. 90a). Moreover, TECA ruled:

> There was no need for the District Court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products. In this respect, it should be noted that this action for restitution under Section 209 differs in significant degree from a private action of damages under Section 210 [Exx. App. 90a-91a.]

In conclusion, TECA approved the "form of relief chosen by the trial court in this action by which the restitution funds will be channeled through the states for use in the enumerated energy programs designed to benefit the consuming public . . . ." (Exx. App. 91a):

> We believe this form of disbursement to be equitable, and fair, and a reasonable method of compensating the consuming public for the HFU overcharges. It accomplishes the intent of Congress that violators of the price regulations be required to disgorge their gains, even in situations where it may not be possi-

> ble to identify and compensate each individual victim. While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest. [Exx. App. 91a-92a, footnote omitted.]

Petitions for rehearing and/or suggestions for rehearing *en banc* filed by Exxon and several intervenor appellants were denied. (Exx. App. 269a-270a). On October 23, 1985, TECA denied a motion by Marathon, Mobil and Murphy for leave to file a second petition for rehearing.

REASONS FOR DENYING THE PETITIONS

The several petitions filed herein uniformly fail to demonstrate that there are, as Rule 17 requires, "special and important reasons" for this Court to grant another round of review of the District Court's exercise of its equitable discretion in formulating a restitutionary remedy for this case. The remedy chosen rests on the District Court's reasoned conclusion—based upon the regulatory scheme and the voluminous record before it—that the consequences of Exxon's overcharges were spread throughout the economy so that individual victims and amounts of injury cannot possibly be identified and that, ultimately, all oil products consumers nationwide suffered as a result of the overcharges. Accordingly, the District Court fashioned a well-grounded remedy to benefit those ultimate consumers.

In turn, TECA, "a court intimately familiar with the intricacies of federal energy regulations," (*Tully* v. *Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), and empowered with exclusive appellate jurisdiction in these matters, agreed with the District Court's findings, and approved its choice

of remedy as "equitable, and fair, and a reasonable method of compensating the consuming public for the . . . overcharges". (Exx. App. 91a). In so ruling, TECA observed that "other remedies might have been adopted by the trial court" (Exx. App. 92a), and thus refrained from limiting future decisions in similar cases. Thus, far from deciding any "important question of federal law which has not been, but should be settled by this Court", it merely applied its long experience with and expertise in the regulatory mechanism it supervises to confirm that the District Court's restitutionary choice not only fell within the broad equitable discretion which prior opinions of this Court and TECA had already settled, but was a commendable exercise of that discretion in the complex context of the particular regulatory violation at issue, where identification of individual injury among many millions of potential claimants was impossible. Petitioners' attempt to narrow this discretion, and to have this Court require the trial court in every case to attempt identification of individual injury even where that task is impossible, lacks both logic and precedent.

Finally, the petitioners' various contentions that they were improperly denied procedural rights are wholly without merit. The only petitioners who sought intervention in the District Court prior to the entry of judgment did so well after final oral argument on the summary judgment motions, and their intervention papers merely added reasons for a finding of impossibility, as described above. All other petitioners requested—and were granted—intervention only for purposes of appeal. Thus, there has been no departure "from the accepted and usual course of judicial proceedings" requiring further review by this Court.

I. TECA'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS EQUITABLE DISCRETION RAISES NO ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

A. Because Section 209 Of The ESA Vested The District Court With Broad Equitable Powers, The Scope Of "Appellate Review Is Correspondingly Narrow"

Section 209 of the ESA, under which the United States brought this suit against Exxon, provides that, in addition to the power to issue mandatory injunctions granted therein, "the court may also order restitution of moneys received in violation of any . . . order or regulation [under this Title]." The District Court was thus vested with broad discretionary power.[27] As Justice Harlan wrote in *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

Justice Harlan also quoted with approval and followed this Court's decision on the scope of equitable jurisdiction under § 205(a) of the Emergency Price Control Act of 1942, *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946):

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a pro-

---

[27] Exx. App. 86a; *Citronelle-Mobile Gathering, Inc.* v. *Edwards*, 669 F.2d 717, 721-722 (Em. App.), *cert. denied*, 459 U.S. 877 (1982); *Sauder* v. *DCE*, 648 F.2d 1341, 1348 (Em. App. 1981).

> ceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . .
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." *Brown* v. *Swann*, 10 Pet. 497, 503. [361 U.S. at 292, quoting 328 U.S. 397-398].

These decisions give special force herein to a corollary of the trial court's "broad discretionary power" in shaping equity decrees—that "appellate review is correspondingly narrow." *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (Op. of Burger, C.J.). *A fortiori*, where as here, the Court of Appeals has approved as "equitable, and fair, and . . . reasonable" the District Court's exercise of its equitable jurisdiction, only a most compelling showing of abuse could justify a second round of review by this Court. No such showing has been made by any of the petitioners herein.[28]

B. The Remedy Chosen By The District Court Was Well-Grounded In Fact And Law

1. The Record And Regulatory Scheme Made It Clear That It Was Impossible To Trace The Impact Of Exxon's Overcharges To Individual Victims

The District Court found, on the basis of the record before it: "The broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of

---

[28] Petitioners are not identically situated substantively or procedurally. Where pertinent in this discussion, we will identify particular petitions or petitioners. Otherwise, the term "petitioners" will mean some or all of those identified in n.7, *supra*.

the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." (Ex. App. 250a).[29] (See p. 7 *supra*). TECA "agree[d] with the trial court that any attempt to trace increased costs attributable to the HFU overcharges would require a full-scale audit of the entire petroleum industry, and that any effort to do so would be futile." (Exx. App. 88a). It explained that conclusion by detailed examination of the regulatory scheme, about which it has developed special expertise in the exercise of its exclusive appellate jurisdiction.

Petitioners point to no evidence which was in the record before the District Court which contradicts, let alone renders unreasonable, the District Court's and TECA's conclusion that the ultimate victims of Exxon's overcharges and the extent of their individual injuries cannot be ascertained in any manageable proceeding. Nor did any of the petitioners offer to present such evidence to the trial court in motions to intervene or otherwise. Here, however, they rely on a 1985 report by DOE's Office of Hearing and Appeals (the "OHA report") in a separate, ongoing proceeding.[30] That report, obviously,

---

[29] The tracing issue was vigorously litigated before the District Court entered judgment. As that court observed, in order "to postpone its day of reckoning" Exxon had argued:

> that it must be allowed to conduct further discovery to determine if the Entitlements Program in fact operated as it was designed and to trace the Hawkins Field overcharges to their ultimate victims. In effect, Exxon would like to launch a nationwide inquiry into the workings of more than 200 domestic refiners during a period of several years. [Exx. App. at 247a-248a.]

[30] Report of the OHA to the United States District Court for the District of Kansas in *Department of Energy Stripper Well Exemption Litigation* ("*Stripper Well Litigation*"), M.D.L. No. 378, reproduced in ATA App. at A-320. Although OHA's factfinding in the *Stripper Well Litigation* should have no bearing upon the correctness of the District Court's earlier findings in this case, based upon the record at the time judgment was entered, the States note

was not before the District Court when it rendered its decision or thereafter. In fact, the OHA report was issued on June 21, 1985, more than a year after oral argument of this case before TECA and less than two weeks before TECA issued its opinion affirming the District Court.[31] The District Court's finding cannot be overturned on the basis of a report which was not before it.[32] Nor can it be overturned on the basis of a criticism of that report,

---

that, like the District Court here, the recent report found, after nearly two years of effort, that:

> it is impossible to trace these increased costs [of crude oil to all domestic refiners] through an individual refiner's refining, distribution and marketing operations. In fact, no party sought to establish such a tracing in the context of this proceeding, or suggested a valid tracing methodology based on inspection of an individual refiner. [ATA App. A-339.]

[31] ATA's assertion that the "very facts" which it alleges concerning the possibility of tracing "appear *in the instant record* in the form of a detailed fact finding report by the OHA" (ATA Pet. 14) is, therefore, incorrect. Indeed, when the OHA report was submitted to TECA that court was careful to provide only "that the Report of OHA of June 21, 1985 be filed in the Office of the Clerk of this Court." Order Denying Without Prejudice Motion To Permit Parties To File A Supplemental Brief On The Significance Of The June 21, 1985 OHA Report And Granting Leave To File The Report. (ATA App. at A-189.)

[32] Indeed, the Kansas district court has not yet decided whether to adopt the OHA report. Moreover, in relying on that report for the proposition that it would be feasible to trace the injuries of the victims of the overcharges, petitioners fail to take due account of the two serious deficiencies which that report itself acknowledges:

First, the report rests on assumptions and estimates which it admits are subject to valid criticism. It is, in its own terms, only one theoretical estimate of the impact on the refining industry as a whole if a particular set of contested assumptions is applied.

Second, as the report states, *no methodology exists by which to determine the impact on any particular refiner, much less downstream customers of any refiner or direct purchaser.* *See* n.30, *supra*; ATA App. at A-346, A-380 to A-381.

as three refiners remarkably argue in a supplemental brief.[33]

2. *The Restitutionary Remedy Selected By The District Court Was Equitable, Fair and Reasonable*

The District Court's decision to look to the Warner Amendment (also referred to as "§ 155") as the model for its choice of restitutionary distribution to benefit consumers was a sound exercise of its discretion since "the victims of the petroleum overcharges cannot be identified." (Exx. App. 256).[34] Three points about the Amendment are especially noteworthy. First, Congress stated that where particular injured individuals "cannot be *reasonably* identified," or their injury "is too small to be capable of *reasonable* determination," a refund for energy related purposes through the States is one which is "*reasonably* expected to benefit the class of persons injured." § 155(a) (emphasis added).[35] Second, in choosing a State-

---

[33] *See* Supplemental Brief of Petitioners Marathon, Mobil, and Murphy in Support of Petitioners (No. 85-430). The materials which that brief presents concerning a controversy over various drafts of the OHA report are, of course, entirely outside the record which was before the District Court and before TECA when it affirmed. It is a measure of these petitioners' desperation that they must rely on such materials, and on the contention that OHA's supposed bias creates a due process issue under *Tumey* v. *Ohio*, 273 U.S. 510 (1927), in order to seek review of a judgment which did not in any way depend on the OHA report.

[34] Because of the change of circumstances resulting from decontrol in 1981, previous mechanisms for passing refunds along the distribution chain to ultimate consumers no longer exist. Thus, as TECA stated, refunds to first purchasers would "result in inequities, inconsistent with the fundamental purpose of restitution under § 209." (Exx. App. 90a).

[35] *See, e.g.*, 128 Cong. Rec. S15116 (daily ed. Dec. 16, 1982) (statement of Senator Percy):

> This money would come from $200 million now in escrow which has been collected from oil company overcharges to consumers during the seventies. This money rightfully belongs to the con-

based remedy, Congress necessarily found that paying such funds to the States, in proportion to their oil product consumption and on behalf of their injured citizens for energy related purposes, is "restitutional." *Id.* Third, in adopting the Amendment, Congress confirmed the propriety of DOE's repeated use of the State remedy to benefit ultimate consumers,[36] and accelerated what DOE had been intending to do with escrowed overcharge funds even without Congressional action, *i.e.*, distribute funds to States on behalf of ultimate consumers.[37]

The petitioners' primary disagreement with the District Court's remedy is, of course, that they would prefer to receive the money themselves. While they do raise objections directed specifically to the use of the Warner Amendment, these do not have any merit.

a. Petitioners argue that the District Court should not have turned to the Warner Amendment as a model be-

---

sumers who were actually overcharged during this period. But because it is impossible to identify each individual consumer, we should at least attempt to place this money where consumers in general will benefit. Distribution to the States provides the quickest means to get this money out.

[36] *See e.g., Alfred B. Alkek*, 9 DOE ¶ 82,521, at p. 85,134 (1982) ("We chose to distribute the money to state governments because we believed that they would be able to design a distribution scheme for the refund proceeds which would benefit all injured consumers in each state, and account for the varying energy-related needs of their citizens. We also believe that the states would be able to expend the proceeds in an administratively efficient and cost-effective manner."); *Adams Resources and Energy, Inc.*, 9 DOE ¶ 82,553 at p. 85,292 (1982).

[37] In proposing the Amendment, Senator Warner stated: "The Department of Energy is seeking to provide secondary remedies to State governments and is currently reviewing a distribution plan which I understand is consistent with this amendment." 128 Cong. Rec. S15115 (daily ed. Dec. 16, 1982). *See also* 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (statement of Senator Kennedy): "DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer."

cause the Amendment provided only for a one-time distribution of funds. The argument overlooks the court's clear statement that it was "in no way rel[ying] on Section 155 as an express statutory grant of authority to this court but [was acting] instead in the exercise of its broad equitable power to order restitution." (Exx. App. 256a, quoted at p. 8, *supra*).[38] Congress' decision not to *compel* future distribution on the basis of the Warner Amendment formula[39] cannot be taken as precluding a court of equity from choosing to do what Congress had done and for similar reasons.[40] "Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *DeMario Jewelry*, 361 U.S. at 291, *quoting Porter*, 328 U.S. at 398; *see also Hecht Co.* v. *Bowles*, 321 U.S. 321, 330 (1944).

b. Some petitioners present undocumented assertions that they will not receive any benefit at all from the programs which the States must fund under the District Court's order.[41] While there is no requirement that the

---

[38] This fact renders frivolous the assertion of the National Freight petitioners that by selecting the approach of the Warner Amendment, the District Court violated the constitutional separation of powers. (Nat. Frt. Pet. 13-14, 21-22).

[39] The Senate-passed version made the Warner mechanism *mandatory* in all future cases. *See* 128 Cong. Rec. S15117 (daily ed., Dec. 16, 1982).

[40] Petitioners rely especially on the comments of Congressman Dingell as forbidding any use of the Warner Amendment as precedent; but, where, as shown above, the statute on its face makes clear Congress' view that its own remedy was reasonable and restitutionary, a court may accept the soundness of that judgment.

[41] The five Federal energy conservation programs involve (1) weatherization of buildings (*see* 42 U.S.C. § 6861 *et seq.*); (2) implementation of State energy conservation programs (*see* 42 U.S.C. § 6321 *et seq.*); (3) reduction of energy consumption in, or the funding of alternate energy sources for, schools and hospitals (see 42 U.S.C. § 6371 *et seq.*); (4) promotion of conservation by small businesses and individuals, (*see* 42 U.S.C. § 7001 *et seq.*); and (5)

remedy adopted by the court directly benefit each person who was injured by the overcharges, it is plain that petitioners' view of these programs is far too narrow. For example, State energy conservation plans are intended to reduce total energy consumption by all citizens and businesses within the State. *See* 42 U.S.C. § 6322(a)(1).[42] A reduction in demand can lower oil product prices, benefitting all buyers, especially commercial users, in proportion to consumption, and in long-range terms will reduce the dangers of harmful energy shortages. Moreover, the provisions which are listed in the District Court's order are sufficiently broad and flexible to permit funding of programs which would quite specifically benefit businesses such as those represented by various petitioners. Without attempting to be exhaustive, we note in the margin some possibilities which readily come to mind.[43]

---

assistance to low-income people in paying home utility bills (*see* 42 U.S.C. § 8621, *et seq.*). *See* Exx. App. 255a, n.58.

[42] To achieve that goal, the plans are *required* to promote more efficient lighting for public buildings and thermal efficiency standards and insulation requirements for new and renovated buildings. 42 U.S.C. § 6322(c). The States are further permitted to adopt transportation controls, programs of public education, and "any other appropriate method or programs to conserve and to improve efficiency in the use of energy." 42 U.S.C. § 6322(d)(5).

[43] State energy conservation plans are intended to be coordinated with the operation of State energy extension service plans, 42 U.S.C. § 7005(h), which in turn allow the States to provide on-site energy use evaluations and recommendations to consumers and businesses, including information about the availability of aid for "planning, financing, installation, and effective monitoring of energy-related facilities and activities." 42 U.S.C. § 7004(b)(6) and (b)(7). Airports and airlines could seek aid for airport improvements to reduce fuel burning caused by delays in landing time under these provisions. Part 450 of 10 C.F.R. contains a list of energy conservation measures already approved by DOE for implementation by State energy extension services with both residential and industrial applications, including, for example, audits, insulation measures, control systems and installation of high efficiency

In short, it was fully appropriate for the District Court to look "at the policy of the legislation and fashion[] a remedy that will effectuate that policy," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957), and in doing so, (as the District Court said) to "respect[] the wisdom of the solution chosen by Congress and [to] adopt it as the most appropriate equitable remedy in the circumstances of this case." (Exx. App. at 256a).

3. *TECA's Decision is Entirely Consistent With This Court's Decisions*

TECA in this case and in its prior decisions has fully attended to this Court's major teaching in *Porter* v. *Warner Holding Co.*, *supra*, that in these public enforcement cases, courts should exercise broad and flexible powers to do equity.[44] Nevertheless, citing private damage action precedents, and ignoring *Porter's* distinction between such private actions and public restitution actions,[45] petitioners argue that *Porter* restricted the scope of equitable jurisdiction, and required individual injury determinations in every overcharge restitution case. They do so by tearing out of context the concluding paragraph of the *Porter* opinion, from which they quote.[46] That paragraph

---

equipment. These are precisely the type of efforts in which many utilities already engage and which the States could help finance under the remedy adopted by the District Court.

[44] *See Citronelle-Mobile* and *Sauder*, p. 14, n.27, *supra*.

[45] "Restitution, which lies within that equitable jurisdiction [granted by § 205(a) of the 1942 price control Act] is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e)." 328 U.S. at 402.

[46] Marathon's argument that by "restitution, Congress meant the refund of overcharges to the party injured" as in *United States* v. *Lieb*, 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Em. App. 1972) (Mar. Pet. 15), is wholly without merit. Where Congress takes pain to confirm an expressly "inherent equitable power" of historically large scope, its action is not to be construed as nar-

set forth the trial court's authority and responsibility on remand to resolve "conflicting claims and counterclaims between tenants and landlord as to the amounts due . . ." (328 U.S. at 403). The "interested parties" whom the trial court was instructed to bring in, if necessary, were the tenants against whom the landlord had such counterclaims, a small and readily ascertainable class.[47] The purpose of bringing them in was not to allow them to assert claims for restitution (which the Secretary was doing on their behalf) but to enable the court to adjudicate any "counterclaims" against them by the landlord.

Because "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each," [48] the teachings of *Porter* which are truly applicable in this case are those which forcefully affirm the broad powers of the courts of equity to fashion a restitutionary remedy, *see* pp. 14 to 15, *supra*. Petitioners' insistence that proceedings were required which would enable them, and the literally countless other persons and entities who were similarly

---

rowing the courts' discretion by requiring them to conform to the particular circumstance of a case which is cited in the legislative history to illustrate that the power already exists.

[47] This portion of the *Porter* opinion was a response to the landlord's argument, based on evidence that he "may have valid counterclaims against certain tenants for damage to or theft of its property." (Br. for Warner Holding Co., No. 793, Oct. T. 1945, p. 36, quoting 60 F. Supp. 513, 520.) This Court's opinion answered the trial court's question: "Could this court, without a jury, adjudicate the amount of restitution in each of the twenty rental units involved here, some of which have had several different tenants, without the tenants before it and without the defendant having an opportunity to interpose valid counterclaims as a defense?" (*Id.*) This Court held that a court of equity did have the power to adjudicate the counterclaims and to bring the tenants before it for that purpose.

[48] Exx. App. at 250a.

situated, to prove their individual injuries in order that they may be compensated, cannot be reconciled with those teachings. Indeed, as the District Court recognized, adoption of the petitioners' position would, as a practical matter, nullify the restitutionary remedy "because DOE [or a court] could never accurately determine the losses suffered by any one claimant." (Exx. App. at 253a.)

The decision below is also entirely consistent with *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). While *Interstate* directed the federal court to make a "prognostication" as to what would in fact have happened as a consequence of federal or State law if the stay had not been issued (*id.* at 584), it was evidently anticipated that this task could readily be accomplished:

> Distribution of the fund should not involve prolonged litigation. It is an administrative matter involving the exercise of an informed judgment by the federal court and should have the flexibility and dispatch which characterize the administrative process. [*Id.*]

Here, by contrast, the courts below have found that allocating the fund among the potential individual claimants is "impossible." (Exx. App. 86a-91a, 247a-151a).[49]

Surprisingly, since this Court does not sit to resolve intracircuit conflicts, petitioners attempt to make much of a supposed inconsistency between the decision below

---

[49] Some petitioners place particular reliance on a portion of Justice Frankfurter's separate concurring opinion. In so doing, they omit the concluding sentence of the paragraph from which they quote: "It will be time enough to distribute the fund by some makeshift rule of thumb if what is concededly a rule of intrinsic fairness should be found judicially unenforceable." (336 U.S. at 590). Justice Frankfurter recognized that even a "makeshift rule of thumb" would be preferable to imposing upon the lower court a duty which it could not perform; here, no "makeshift" rule was needed since there existed a model well grounded in Congressional and administrative example.

and that in *Citronelle-Mobile Gathering, supra.* In so doing, petitioners simply disregard TECA's careful and detailed explanation (Exx. App. 85a-87a) of why "the District Court's judgment and Order . . . are fully in accord with our ruling in *Citronelle* . . . ." (*Id.* 85a).

II. NONE OF THE PETITIONS PRESENTS A PROCEDURAL ISSUE WARRANTING REVIEW

Petitioners present an array of procedural objections to the District Court's decision, invoking variously Rules 24 (intervention) and 56 (summary judgment) of the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. Their common objection, whatever the form of their individual arguments, is that the District Court should have granted them a hearing on the issue of remedy. A close examination of the proceedings below and of the respective petitions shows that none of the petitioners present a procedural issue meriting review.

A. At the outset, it is essential to recall that most of the parties that are now petitioners here sought leave from the court to intervene *only for the purposes of appeal.* This was true of all the parties who moved to intervene after the court issued its decision—specifically three of the refiners who petition in No. 85-430 (Marathon, Mobil and Murphy); all parties to the ATA petition (No. 84-432) except the Gasoline Retailers (specifically ATA, Petroleum Marketers and Jobbers); as well as PECO (No. 85-440); and all parties to the National Freight petition (No. 85-444) (National Freight, RJG Cab and Sweeney). These parties did not move the District Court for leave to adduce any evidence to refute any of the findings which the court had made or otherwise to reconsider its decision. In short, since the District Court granted the postjudgment movants all the intervention which they sought, they cannot now assert that the court denied them any procedural rights.

B. This leaves to be considered only the procedural objections of the prejudgment (but post-oral argument) movants, the Indicated Refiners and the Gasoline Retailers.

1. Four of the refiners who were parties to the Indicated Refiners' prejudgment motion to intervene have joined in the Marathon petition;[50] that petition raises two related procedural issues. (Mar. Pet. i).

The first is that the District Court should have given notice and an opportunity to be heard to all potential claimants. That issue is insubstantial. The court could not possibly provide notice or an opportunity to be heard to all such persons, which include not only the present intervenors, but all others similarly situated, including, for example, 187,000 gasoline retailers and tens of millions of individual motorists. The refiners have asserted that *they* were injured and were unable to pass through all of the overcharges, but not that other persons such as consumers bore none of the burden. Moreover, as the refiners recognize, TECA ruled that such notice was unnecessary "on the theory that actual overcharges are incapable of judicial proof." (Mar. Pet. 20). They now contend—and this is the second part of the question which they present—that "that 'finding' is pure speculation." (*Id.*).

As shown above, however, the District Court's finding was fully substantiated in the Court's analysis of the regulatory framework and the particular record before it, the issue having been pressed by Exxon. Even more important for present purposes, the refiners cannot ask this Court to review that finding because, far from proffering any contrary evidence, they conceded the impossibility of tracing the overcharges below. In the District Court the Indicated Refiners asserted that "it is impossible to trace the impact of the overcharges directly to

---

[50] They are Ashland, Pennzoil, Tenneco and Tosco.

any subsequent purchasers." (XLV R. 38973). Before TECA, the other refiners who here join in the Marathon petition asserted that with respect to both controlled and uncontrolled petroleum products that it would be impossible to determine whether or not the refiners absorbed or passed on the overcharges.[51]

The refiners so argued because their position in the courts below was that the rule in antitrust damage suits under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) should be applied by analogy. They argued that in providing a remedy under § 209, the District Court was bound to award restitution to the first purchaser without regard to actual injury, as TECA had done in certain circumstances in private § 210 damage suits. TECA rejected that restrictive view of § 209 (Exx. App. 90a) and the question presented in the Marathon petition does not challenge this basis for denying the refiners' claim. That is, of course, a separate and independent ground for denying the refiners' petition.[52]

2. The Gasoline Retailers present no question or argument relating to the fact that their motion to intervene

---

[51] Brief of Intervenor-Appellants Marathon Petroleum Company, *et al.*, at 16-17. This statement by Marathon, *et al.* and that of another refiner which is not a petitioner here were cited by TECA in making the very ruling which the refiners now challenge. *See* Exx. App. 90a, quoted at p. 11, *supra*.

[52] In the closing footnote of their petition, the refiners say that, if the lower courts had applied the principles of the above-cited decisions, "*the impossibility of proving the absorption or pass on of overcharges in transactions subsequent to the first purchases* would have required the entire restitutionary award to be made to the first purchaser unless a showing was made that a subsequent purchaser had a fixed quantity cost plus contract or its functional equivalent." (Mar. Pet. 24, n.21, emphasis added). The underscored passage is consistent with the refiners' position below, but cannot be reconciled with the theory of their petition—that they are entitled to a hearing on whether it is "impossible".

was filed prior to the District Court's judgment.[53] Rather, their petition makes a more general point, applicable to all the parties which join therein, that, because the District Court had granted them intervention as a matter or right under Rule 24(a), it violated that Rule by denying them the opportunity to present evidence of their injury. ATA Pet. i, first question; 18-21.[54] This contention is a *non sequitur*, for Rule 24(a) contains within it the requirement that the motion to intervene as of right be "timely".

Here, all the motions which sought intervention for the *purpose of appeal* were timely for that purpose and were granted. On the other hand, neither the motion of the Gasoline Retailers nor that of the Indicated Refiners, which were filed prior to judgment but after oral argument on DOE and Exxon's motions for summary judgment, were timely for the purpose of requiring the District Court to reopen its proceedings. The indisputable fact is that from the very outset of this case it has been clear that the United States was seeking restitution in the form of a payment into the United States Treasury. (*See* Complaint quoted at p. 5, n. 15, *supra*). The movants did not suggest in the District Court—nor do they

---

[53] The Retailers' motion to intervene was originally denied by the District Court on the basis of its finding that the real victims of the overcharges were the ultimate *consumers* of petroleum products. (Exx. App. 249a, n.56). It is significant that the petition for certiorari in which they joined contains nothing to show that any retailer can demonstrate injury as a result of Exxon's overcharges.

[54] The parties to the ATA petition other than the Gasoline Retailers cannot maintain that contention for the additional reason that they moved to intervene only for the purposes of appeal. They are thus making the unsupportable assertion that the District Court erred by denying them that for which they did not ask. Likewise, since *none* of the petitioners opposed the granting of summary judgment, in accordance with the procedures of Rule 56 or otherwise, the argument in the ATA petition, pp. 21-23, that their rights under Rule 56 were infringed is also untenable.

demonstrate now—that they had a right to wait until the proceedings before the District Court were virtually complete before seeking to make a record on their claims.

The position urged in the ATA petition would lead to the absurd result that, where intervention is as of right, intervention may not be granted for purposes of appeal only. This Court has, however, approved intervention for purposes of appeal only, stressing that the propriety of such an appeal depends on "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977). *Cf. NAACP* v. *New York*, 413 U.S. 345, 366 (1973). In *McDonald*, intervention had been allowed under Rule 24(b), *see id.* at 390, but the Court there cited with approval a series of court of appeals decisions which allowed intervention for purposes of appeal only under Rule 24(a). (*Id.* at 395-396, n.16).[55]

No distinction between Rules 24(a) and (b) for this purpose has been proffered in the ATA petition, or readily suggests itself. If petitioners' submission were correct, a party whose interest is sufficient to allow intervention as of right and is timely for purpose of appeal could not be granted such intervention without being allowed to reopen the case in the trial court, even if its intervention is untimely for that purpose. Any such result would either defeat the right to intervene for purposes of appeal only or undermine the timeliness requirement of Rule 24(a).

---

[55] These cases are: *Hodgson* v. *United Mine Workers*, 153 U.S. App. D.C. 407, 419, 473 F.2d 118, 129 (1972); *Smuck* v. *Hobson*, 132 U.S. App. D.C. 372, 378-379, 408 F.2d 175, 181-182 (1969); *Pellegrino* v. *Nesbit*, 203 F.2d 463, 465-466 (9th Cir. 1953); *Wolpe* v. *Poretsky*, 70 U.S. App. D.C. 141, 144, 144 F.2d 505, 508, *cert. denied*, 323 U.S. 777 (1944). The reports of the other cited cases do not state whether Rule 24(a) or (b) intervention was involved.

In sum, the prejudgment movants' procedural objections are no more worthy of review than those of the other petitioners, who intervened for purposes of appeal only.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
of Massachusetts
GEORGE B. DEAN
ALAN L. KOVACS
One Ashburton Place—
20th Floor
Boston, Massachusetts 02108

DAVID FROHNMAYER
Attorney General of Oregon
DONALD C. ARNOLD
100 State Office Building
Salem, Oregon 43710

JOHN VAN DE KAMP
Attorney General of California
YEORYIOS C. APALLAS
6000 State Building
350 McAllister
San Francisco, California 94102

ANDREW P. MILLER
GEORGE KAUFMANN
STEPHAN G. WIELGOZ
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

BERNARD NASH
EDWARD G. MODELL
BLUM, NASH & RAILSBACK
1133 Fifteenth Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 857-0220

JAMES F. FLUG
PAULA DINERSTEIN
LOBEL, NOVINS & LAMONT
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

December 23, 1985

(5) (4) (4) (3) (3)

Nos. 85-429, 85-430, 85-432, 85-440, and 85-444

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20585

BEST AVAILABLE COPY

42 pp

QUESTIONS PRESENTED

1. Whether crude oil price control regulations in effect between 1973 and 1981 required petitioner Exxon Corporation to calculate the amount of "new oil" at its Hawkins Field Unit by reference to the additional oil actually produced in the unit as a whole rather than by reference to production that Exxon shifted from one lease to another within the unit (No. 85-429).

2. Whether the regulations impermissibly discriminated between units formed at different times (No. 85-429).

3. Whether Exxon's suggested effective date for calculating new oil on a unit-wide basis was unreasonable as a matter of law (No. 85-429).

4. Whether Exxon was properly held liable for all of the crude oil overcharges that it caused (No. 85-429).

5. Whether the district court abused its discretion in ordering the restitution of crude oil overcharges through the States (Nos. 85-430, 85-432, 85-440, and 85-444).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
1. Regulatory background	2
2. Factual background	8
3. Proceedings below	11
Argument	15
Conclusion	35

TABLE OF AUTHORITIES

Cases:

American Farm Lines v. *Black Ball Freight Service*, 397 U.S. 532	21-22
Board of County Commissioners v. *United States*, 308 U.S. 343	25
Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281	23
Bulzan v. *Atlantic Richfield Co.*, 620 F.2d 278	34
Capital Cities Cable, Inc. v. *Crisp*, No. 82-1795 (June 18, 1984)	22
Christmann & Welborn v. *DOE*, 773 F.2d 317, cert. denied, No. 85-81 (Oct. 15, 1985)	19, 25
Cities Service Co. v. *DOE*, 715 F.2d 572	32
Cities Service Co. v. *FEA*, 529 F.2d 1016, cert. denied, 426 U.S. 947	28
Citronelle-Mobile Gathering, Inc. v. *Edwards*, 669 F.2d 717, cert. denied, 459 U.S. 887	33
DOE v. *Louisiana*, 690 F.2d 180, cert. denied, 460 U.S. 1069	16, 22
DOE Stripper Well Exemption Litigation, In re, 578 F.Supp. 586	28
Exxon Corp. v. *DOE*, 744 F.2d 98, cert. denied, No. 84-188 (Dec. 3, 1984)	15
FPC v. *Interstate Natural Gas Co.*, 336 U.S. 577	33
Francis Oil & Gas, Inc. v. *Exxon Corp.*, 687 F.2d 484, cert. denied, 459 U.S. 1010	16
Grigsby v. *Doe*, 585 F.2d 1069, cert. denied, 440 U.S. 908	16

Cases—Continued: Page

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 29
Hecht Co. v. *Bowles*, 321 U.S. 321 28
Heckler v. *Campbell*, 461 U.S. 458 22-23
Heckler v. *Community Health Services*, No. 83-56 (May 21, 1984) 19
INS v. *Chadha*, 462 U.S. 919 15
Pennzoil Co. v. *DOE*, 680 F.2d 156, cert. dismissed, 459 U.S. 1190 .....4, 13, 16, 17, 19
Placid Oil Co. v. *FPC*, 483 F.2d 880, aff'd *sub nom. Mobil Oil Co.* v. *FPC*, U.S. 283 17
Porter v. *Warner Holding Co.*, 328 U.S. 395 .....28, 31, 33
SEC v. *Chenery Corp.*, 332 U.S. 194 22
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, cert. denied, 404 U.S. 1005 26
Sam Fox Publishing Co. v. *United States*, 366 U.S. 683 .. 32
Sauder v. *DOE*, 648 F.2d 1341 .....14, 25, 34
Schweiker v. *Hansen*, 450 U.S. 785 19
Tenneco Oil Co. v. *FPC*, 442 F.2d 489 26
Tully v. *Mobil Oil Corp.*, 455 U.S. 245 ..... 15, 26
Udall v. *Tallman*, 380 U.S. 1 18
United States v *Automobile Manufacturers Ass'n*, 307 F.Supp. 617, aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 32
United States v. *Caceres*, 440 U.S. 741 21
United States v. *Lovasco*, 431 U.S. 783 16
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 23
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 23
Wisniewski v. *United States*, 353 U.S. 901 34

Constitution, statutes, regulations and rule:

U.S. Const. Amend. V (Due Process Clause) 32
Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note 2, 32
§ 209 .....32, 33, 34
§ 210 32
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* 3
15 U.S.C. 757(b)(2) 5

Constitution, statutes, regulations and rules – Continued: Page

Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.* 5

Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (Warner Amendment) 31

6 C.F.R.:

Pt. 150, Subpt. L (1974) 2

Section 150.354 (1974) 2, 3

10 C.F.R.:

Pt. 212, Subpt. D. (1975) 2

Section 212.72 (1975) ..... *passim*

Section 212.75 (1977) 6, 7, 8, 10, 12, 14, 21, 22

Fed. R. Civ. P. 56 23

Miscellaneous:

128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) 31

38 Fed. Reg. (1973):

p. 22536 2

p. 22538 3

pp. 22538-22543 2

39 Fed. Reg. (1974):

p. 1924 2

p. 1952 ..... 2, 3

40 Fed. Reg. 40832 (1975) 4, 5

41 Fed. Reg. (1976):

p. 4920 3

p. 4931 ..... 3, 5, 20

pp. 4936-4937 6

p. 4937 ..... 5, 6, 7, 20

p. 4938 ..... 3, 6

p. 4940 4

p. 4941 6

p. 36172 ..... 7, 22

p. 36184 ..... 7, 22

42 Fed. Reg. (1977):

p. 4409 7

p. 4414 8

p. 4415 8

p. 23723 4

p. 23726 4

p. 23730 4

p. 23740 4

p. 25659 4

S. Rep. 94-1119, 94th Cong., 2d Sess. (1976) 31

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-429

EXXON CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-430

MARATHON PETROLEUM COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-432

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL, PETITIONERS

v.

EXXON CORPORATION AND UNITED STATES OF AMERICA

No. 85-440

PHILADELPHIA ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 85-444

NATIONAL FREIGHT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-172a) is reported at 773 F.2d 1240. The opinion of the district court (Pet. App. 173a-268a) is reported at 561 F.Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1985, and petitions for rehearing were denied on August 15, 1985 (Pet. App. 269a-270a). The petitions for a writ of certiorari in Nos. 85-429 and 85-440 were filed on September 13, 1985. The petitions for a writ of certiorari in Nos. 85-430, 85-432, and 85-444 were filed on September 14, 1985. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.

STATEMENT

1. *Regulatory background. a.* In 1973, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974), 38 Fed. Reg. 22536, 22538-22543 (1973); see also 10 C.F.R. Pt. 212, Subpt. D (1975), 39 Fed. Reg. 1924, 1952 (1974) (regulations as repromulgated under the

---

[1] "Pet." and "Pet. App." refer to the petition and appendix in No. 85-429.

[2] Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983). See Pet. App. 8a n.4, 173a n.1.

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating economic incentives for increasing domestic production. See Pet. App. 9a, 175a, 206a.

The "primary statutory mandate [was] to hold down prices of crude oil" by setting a ceiling for the price of domestic oil which was already being produced, referred to as "old oil." Pet. App. 197a. Old oil was defined as the monthly production from a property that did not exceed the property's "base production control level" (BPCL), which was its production for the same month in 1972. Production in excess of the property's BPCL was deemed "new oil" that could be sold at prices above the controlled price for old oil, thus avoiding any disincentive for producers to discover new sources of oil and to increase the amounts of oil recovered from properties already in production. See *id.* at 9a, 196a; 6 C.F.R. 150.354 (1974), 38 Fed. Reg. at 22538; 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952.

Central to the two-tier system was the definition of the "property" for which the BPCL and current production were calculated. See 41 Fed. Reg. 4931, 4938 (1976). The regulations defined property as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 10 C.F.R. 212.72 (1975), 39 Fed. Reg. at 1952 (repromulgating 6 C.F.R. 150.354 (1974)).[3] Left to their own devices, producers might seek to " 'obtain higher prices by arranging production in such a way as to shift oil into the "new" category to the maximum extent possible.' " Pet. App. 197a (citation omitted). Accordingly, the defini-

---

[3] In 1976, Section 212.72 was "grammatically altered" (Pet. App. 177a n.5) "without substantive change" (*id.* at 9a) to define property as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." 41 Fed. Reg. at 4920.

tion of property in Section 212.72 was intended to be interpreted in light of DOE's " 'duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls.' " *Ibid.* (citation omitted).

b. This case arises out of DOE's interpretation of its definition of property, and hence its determination of the proper amount of new oil produced, with respect to unitized crude oil producing properties formed after 1972, the base year for computing the BPCL. Unitization is a "cooperative production process" for "large, multilease tracts which * * * [fomerly] operated as independent, competing properties." Pet. App. 177a. Under a "Unit Agreement," the "previously competing leaseholders * * * group their interests and form a single unit comprising all of the interests in the single reservoir of oil," which permits "enhanced recovery efforts [that] cause oil to flow underground across lease lines." *Id.* at 178a n.6. Following unitization, production from many wells is typically reduced or eliminated altogether while production from other wells within the unit is substantially increased. *Id.* at 15a, 178a n.6; 40 Fed. Reg. 40832 (1975).

DOE consistently interpreted the definition of property in Section 212.72 to require that the amount of new oil produced at units formed after 1972 be determined on a unit-wide basis, *i.e.*, by comparing the current monthly production from the unit with a BPCL consisting of the total amount produced during the same month in 1972 from all of the leases comprising the unit. See Pet. App. 10a; *Pennzoil Co.* v. *DOE*, 608 F.2d 156, 162-163 & n.11 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[4] The agency published this position in Ruling 1975-15, 40 Fed. Reg. 40832 (1975), where it stated that a unit's "BPCL is the total 1972 monthly production from

---

[4] Certain of these interpretations, Nos. 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, 25659 (1977). See Pet. App. 10a, 178a n.7.

all of the several leases that now comprise the unit." This approach was "dictated * * * by the need to compare like quantities, [during and after] 1972, in order to ensure a meaningful application of the new [oil]" provisions. *Ibid.* Otherwise, the "distorted actual production from any one lease comprising the unit" (*ibid.*; emphasis omitted) resulting from the shifts in production that normally accompany unit-wide production would allow producers to take advantage of the higher prices permitted for new oil far beyond the actual increase, if any, in their production of oil. As DOE explained, "the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual increases in production from those leases since the base period." 41 Fed. Reg. 4931, 4937 (1976). For these reasons, the agency concluded that "the unit agreement signifies one right to produce crude oil" and that "the unit [therefore] defines the property" under Section 212.72 of the regulations. 40 Fed. Reg. at 40832. See Pet. App. 10a, 177a-179a.

c. In December 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 *et seq.*, in light of changes in the condition of the nation's oil supplies. The statute permitted for the first time "price increases, without current increases in production, when the agency found that such price increases would give incentives for 'enhanced recovery techniques.' " Pet. App. 10; see *id.* at 179a-180a.[5] In response to the new statute and industry comments, in February 1976 DOE promulgated a new regulation effective prospectively from

---

[5] Absent such circumstances, Congress specifically prohibited regulatory changes permitting "an increase in the price for any volume of old crude oil production." 15 U.S.C. 757(b)(2). See Pet. App. 179a-180a.

February 1, 1976, 10 C.F.R. 212.75 (1977), 41 Fed. Reg. at 4941. Section 212.75 provided that a "producer shall, as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substantially altered (whichever date occurs first), establish a unit base production control level for the unit." Before that time, meaningful lease-by-lease comparisons would still be possible, and delaying implementation of the unit-wide BPCL would remove certain "disincentive[s] to the *prospective* unitization of properties." 41 Fed. Reg. at 4938 (emphasis added); see also *id.* at 4936-4937. The regulation defined "enhanced recovery" as "any method * * * of recovering crude oil in which part of the energy employed to move the crude oil through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." [6]

DOE also applied its more lenient approach toward unitized properties to existing units subject to Section 212.72 by rescinding ab initio "[t]hat limited portion of [Ruling 1975-15] which require[d] the producer *as of the effective date of unitization* to total all the BPCL's of participating leases and to treat the unit as a single property." 41 Fed. Reg. at 4937 (emphasis added). The agency reaffirmed the basic principle of Ruling 1975-15, embodied in 6 C.F.R. 212.72 (1975), that unitization normally requires unit-wide production comparisons in order to determine the true incremental increase in oil production; it concluded, however, that calculation of a unit-wide BPCL need not in every instance take place immediately upon unitization. 41 Fed. Reg. at 4937. Rather, DOE deter-

[6] The agency "ma[de] it clear" that its definition of enhanced recovery "would apply * * * so long as the '*energy employed* to move the crude oil through the reservoir is applied from extraneous sources.' The fact that the injected fluids or gases may have originated in the reservoir is irrelevant as long as they are injected by an extraneous energy source." 41 Fed. Reg. at 4938 (emphasis in original).

mined that a unit-wide BPCL need be implemented only after "there has been a significant alteration in pre-unitized producing patterns of the individual leases" or "enhanced recovery operations [have begun]." *Ibid.*; see generally Pet. App. 11a-12a, 180a-181a. The agency stated that at a later time it would further clarify the standard of a significant alteration in production patterns beyond its extensive reference in the preamble to the necessity for adopting a unit-wide BPCL where a meaningful comparison of pre- and post-base level production would not be possible on a lease-by-lease basis. 41 Fed. Reg. at 4937; see also 41 Fed. Reg. 36172, 36181 (1976). See generally Pet. App. 10a-12a, 180a-182a.

d. After receiving comments on the issue, DOE amended Section 212.75 in August 1976 to define "significant alteration in producing patterns" as "the occurrence of either (1) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (2) the increase of production allowables [*i.e.*, maximum permitted production levels] for any property that constitutes the unitized property." 41 Fed. Reg. 36172, 36184. Once either of these events occurred, the BPCL was required to be calculated on a unit-wide basis. *Ibid.* At the same time, the agency further amended Section 212.75 "to eliminate any remaining disincentive to producers of new crude oil to enter unitized properties" by granting them the benefit of "imputed new oil," which ensured that newly formed units would be permitted to sell at least as much new oil as they had produced before unitization. 41 Fed. Reg. at 36182; see *id.* at 36184. See generally Pet. App. 12a, 182a.

e. In response to further comments, the agency clarified its amended Section 212.75 in Ruling 1977-2, issued in January 1977. 42 Fed. Reg. 4409. This ruling made clear that "Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1,

1976." *Id.* at 4415. Units formed prior to that date, by contrast, were governed by Section 212.72, as reflected in Ruling 1975-15 (as modified on February 1, 1976). *Ibid.* The later definition of "significant alteration in producing patterns" promulgated in August 1976 would "be considered as guidance" with respect to determining the date on which a unit BPCL would be required for these earlier-formed units. *Ibid.* Producers would be permitted to attempt "to justify the establishment of the date of significant alteration in producing patterns" on other reasonable grounds "on a case-by-case basis." *Ibid.* DOE also explained that the special incentive of "imputed new oil" provided in the amendment to Section 212.75 effective September 1, 1976, was available only for units undergoing a significant alteration on or after that date. 42 Fed. Reg. at 4414. See Pet. App. 12a, 182a-183a.

2. *Factual background.* a. Oil was discovered in the Hawkins Field in Texas in 1940. Within a decade, more than 200 companies and individuals were producing oil on more than 300 leases in the field; by 1969, petitioner Exxon Corporation[7] owned two-thirds of the field's production. The Texas Railroad Commission regulated the competitive production of oil from Hawkins Field by setting "production allowables" limiting the amount of oil that could be produced from each well. The Commission also established a "maximum efficient rate of production" (MER), which limited the volume of oil that could be pumped from the field as a whole each day. Under the Commission's MER rules, any shortfall in a lease's daily production under its allowable was distributed pro rata to all of the other capable leases in the field in order to allow total production to remain at the MER level. Pet. App. 14a-15a, 183-184a.

Several years before the promulgation of crude oil price

---

[7] Unless otherwise stated, we will use "petitioner" to refer to Exxon Corporation.

control regulations, petitioner and other owners of interests in Hawkins Field recognized the need to initiate enhanced recovery operations in order to arrest the decline in natural reservoir pressure that had occurred over the years and thereby to prolong the life of the field. In 1969, petitioner began to promote unitization of the field, which would spread the cost of recovery operations and permit the use of techniques that would move oil across lease lines. In preparation for unitization, the Commission authorized petitioner in 1969 to conduct a limited interim gas injection project and significantly increased the field's daily MER allowable. Pet. App. 15a-16a, 184a-185a.

During the extensive negotiations leading to a unit agreement, petitioner projected a net after-tax profit for the interest owners resulting from unitization of more than $250 million. This figure was based on an oil price substantially below the price at which *old* oil eventually sold under price controls. The unit agreement, ultimately signed in 1974, provided that petitioner would operate the unit beginning on January 1, 1975. Pet. App. 16a, 185a; R. 23881-23882, 24057, 24128-24130.

b. Following the promulgation of price controls in 1973, petitioner issued instructions to its employees requiring that each of its multi-lease units, including those (like Hawkins Field) formed after 1972, must be treated as a single property for price regulation purposes, and petitioner in fact followed those instructions at other post-1972 units. Pet. App. 16a-17a, 186a-187a. In July 1974 petitioner informed other Hawkins Field interest owners that, "[a]fter unitization, the field is treated as a single lease and exempt [*i.e.*, new] oil is calculated on a total field basis." R. 24366. As petitioner explained, this would result in "much less exempted oil volume than under nonunit operation." R. 24375; see also R. 24379, 24385. Notwithstanding the smaller amount of new oil that would be available under the unit price rule, 98.5% of

the working interest owners in Hawkins Field and 82% of its royalty interest owners had signed the unit agreement as of early August 1974. R. 24411; see also R. 18013-18014.

c. Shortly before unitization became effective, however, petitioner decided to depart from its prior representations to the Hawkins Field interest owners and from its pricing practices at other unitized fields by announcing that it would continue lease-by-lease accounting at Hawkins Field following unitization. Pet. App. 17a, 187a-188a. Once unitization began, petitioner was permitted by the state regulatory agency "to transfer production among wells within the unit, *at will.*" *Id.* at 16a (emphasis in original). Petitioner immediately took advantage of this new flexibility by shutting in more than 20% of the unit's wells, which enabled it to reduce production at 137 leases by nearly 320,000 barrels and to increase production by an equal amount at 65 other leases. *Id.* at 46a. Petitioner also substantially increased the volume of gas that it injected into the field. *Id.* at 49a-50a, 230a-231a.

In light of petitioner's continued lease-by-lease accounting following unitization, its transfer of production among leases "resulted in substantial increases in 'new' oil, without any actual increase in total production from the field." Pet. App. 46a. Petitioner "doggedly persisted, even in the face of the pellucid dictates of Ruling 1975-15, in applying individual lease accounting at the Hawkins Field." *Id.* at 234a (footnote omitted). It did not adopt a unit-wide BPCL until September 1, 1976. When it did so, petitioner performed its calculations under the more generous provisions of Section 212.75 of the regulations rather than under Section 212.72, even though the agency consistently had determined—and made explicit in January 1977—that Section 212.75 did not apply to units such as Hawkins Field that were formed prior to February 1976. Pet. App. 18a, 190a. Petitioner continued accounting on this basis until decontrol in 1981. Despite a "steady

decline in production" at Hawkins Field during the period that controls were in effect, petitioner's pricing practices ensured that "an *increasing* percentage of oil was accounted for by [petitioner] as upper-tier, higher-priced oil, until beginning June 1, 1979, almost all of the [production] was classified as new oil." *Id.* at 190a (emphasis added).

3. *Proceedings below.* a. The United States filed this action in the United States District Court for the District of Columbia, seeking restitution from petitioner of the overcharges that it caused by improperly computing the amount of new oil produced at Hawkins Field.[8] On cross-motions for summary judgment, the district court denied petitioner's motion and granted the government's motion to require restitution of all overcharges with interest. Pet. App. 173a-268a. The district court held that Section 212.72 of the regulations required the adoption of a unit-wide BPCL immediately upon unitization and that petitioner suffered no prejudice from application of the less stringent "significant alteration" test as "guidance" for determining the date at which calculation of such a BPCL was required. *Id.* at 206a-210a, 213a-214a. The district court rejected petitioner's contention that the government was estopped from enforcing its regulations, noting that "a regulated party as sophisticated as [petitioner]" could not reasonably "ignore[ ] the only existing official pronouncements" in favor of "unauthorized views of agency employees ferretted out by [petitioner] which happen to coincide with [its] self-interest." *Id.* at 234a.

The district court also determined that DOE's "sliding scale of incentives, though complex, reasonably carried

---

[8] The government also sought civil penalties. The district court declined to assess a penalty, noting that while petitioner "ignor[ed] the unequivocal dictates" of the regulations, it "accurately represented its conduct to the agency." Pet. App. 260a. The government did not prosecute an appeal from this ruling. *Id.* at 5a.

out the conflicting objectives" of holding down prices while increasing production. Pet. App. 220a n.37. Accordingly, the agency did not act improperly in offering special benefits, such as imputed new oil, to producers that, unlike petitioner, had not found unitization economically attractive without those benefits. *Id.* at 214a-221a. "In refusing to go further and to extend greater benefits to pre-existing units" such as Hawkins Field, the district court reasoned, "the agency performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Id.* at 220a. The district court also noted the "puzzling" nature of petitioner's attacks on Section 212.75, since even if that regulation were invalidated, Section 212.72, which set forth the definition of "property," nonetheless required implementation of a unit BPCL at Hawkins Field as of January 1, 1975. Pet. App. 227a n.39.

Giving petitioner the benefit of the relaxed requirement of Ruling 1977-2, and applying as guidance the definition in Section 212.75, the district court ruled that a unit BPCL was required under that definition as well on January 1, 1975, because a "significant alteration in producing patterns" occurred as of that date. Pet. App. 221a-231a. The district court reached this result in view of the increased injections of gas, increases in production allowables, and substantial transfer of production among leases that occurred simultaneously with unitization. The district court also concluded that, as a matter of law, petitioner had not offered any basis for the choice of a reasonable alternative date on which to begin unit-wide accounting. *Id.* at 226a-227a n.38.[9] Petitioner's reliance on the testimony of

---

[9] The district court addressed this issue even though petitioner had not actually contended that its evidence established a reasonable alternative date within the definition set forth in the regulations and the question therefore was "not before the court." Pet. App. 226a n.38; see also *id.* at 52a-53a & n.26.

petroleum engineers with respect to the underground drive mechanism of the Hawkins Field reservoir would be unworkable, the district court found, because it would substitute "hard to decipher underground phenomena" for the "clear, easily administered test" adopted by DOE. *Id.* at 222a.

Finally, the district court held petitioner liable for the full amount of the overcharges from Hawkins Field because petitioner had caused those violations of the law by its pricing and production decisions as operator of the unit. Pet. App. 239a-259a. In light of the impossibility of identifying the ultimate victims of petitioner's actions, the district court exercised its equitable powers to order the funds to be deposited in an escrow account for distribution to the states in connection with specified energy conservation programs. *Id.* at 255a-256a.[10]

b. The court of appeals affirmed. Pet. App. 1a-172a.[11] Relying on its decision in *Pennzoil Co.* v. *DOE, supra,* the court of appeals held that Section 212.72 "required the establishment of a single BPCL upon unitization of the Hawkins Field." Pet. App. 29a. It further noted that Ruling 1975-15, which made this interpretation explicit, was later only partially rescinded and that the agency's focus remained on "the fact that lease-by-lease accounting was not permissible after some alteration in production methods precluded any 'meaningful comparison' of current and base period production." *Id.* at 30a.

The court of appeals agreed with the district court that, even under the relaxed application of Section 212.72 and

---

[10] In view of the fact that the judgment was only a small fraction of petitioner's net worth, the district court relieved petitioner of the requirement that it post a bond pending appeal. See R. 31664.

[11] The panel was unanimous with respect to petitioner's liability. Judge Becker dissented in part solely on the ground that persons claiming to be actual victims of petitioner's overcharges should have been afforded an opportunity to prove the fact and amount of their damages. Pet. App. 93a-172a.

the significant alteration test, petitioner was required to adopt a unit BPCL for Hawkins Field as of January 1, 1975. *Id.* at 30a-39a, 43a-51a. The court of appeals rejected petitioner's contention that Hawkins Field never would have been unitized had the owners known that a unit BPCL was required, noting that petitioner "was well aware that Section 212.72 required adoption of unit-wide accounting upon unitization." *Id.* at 40a.[12] The court of appeals also concluded that the special benefits for prospective unitization provided in Section 212.75 were not arbitrary. *Id.* at 41a-43a.

The court of appeals rejected petitioner's argument that it had established a reasonable alternative basis for unit-wide accounting for two reasons. First, "any meaningful comparison of production levels between 'old' and 'new' oil on a lease-by-lease basis became impossible once production across lease lines began in January, 1975." Pet. App. 53a. Second, "any resort to the testimony of expert petroleum engineers * * * would be unworkable, and therefore, not a reasonable basis for determination of the question." *Id.* at 54a-55a.

Relying on its decision in *Sauder* v. *DOE*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981), the court of appeals agreed with the district court that petitioner was liable for all of the overcharges from the unit because "[t]he undisputed evidence" (Pet. App. 57a) demonstrated that petitioner caused those overcharges. *Id.* at 55a-61a. The court of appeals also held that the district court had properly exercised its equitable discretion in requiring petitioner to pay the full amount of the overcharges in view of petitioner's failure to follow the clear commands of the regulations. *Id.* at 76a-77a. Finally, the court of appeals upheld the

---

[12] Unitization was attractive even under the unit BPCL requirement because it made possible the production of more oil for the unit as a whole than if the owners had continued competitive production and lease-by-lease accounting. See Pet. App. 40a; see also Pet. 2.

district court's order concerning disposition of the judgment. *Id.* at 78a-92a; see note 11, *supra*.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The Temporary Emergency Court of Appeals decided a narrow issue of regulatory construction under a program of emergency price controls that has long since expired and is of no continuing importance. As this Court has noted, Congress established TECA in order to ensure expert and uniform treatment of energy issues, and it is "a court intimately familiar with the intricacies of federal energy regulation." *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982). TECA carefully considered the arguments presented in the petitions, and it rejected them in a thoughtful decision.[13] In these circumstances, further

[13] Petitioner Exxon's renewal (Pet. 27 n.24) of its prior attack (84-1142 Pet. 9-11) on the integrity and impartiality of the judges designated by the Chief Justice to serve on TECA is unwarranted and disrespectful of the judges who devote their time and energy to serving on that court. Petitioner's specious and impertinent claim that TECA's supposed partiality is "widely recognized" is not corroborated by the references on which it relies. Moreover, petitioner fails to support the implication of its allusion to the government's success in cases before TECA—*i.e.*, that those cases were wrongly decided. Rather, the outcome of cases in TECA reflects the insubstantial nature of many of the arguments raised in opposition to DOE positions, something further illustrated by Exxon's petition in this case. We note that our own informal survey indicates that the other courts of appeals have decided approximately 90% of appeals relating to the Emergency Petroleum Allocation Act on the merits in favor of the government. Finally, petitioner's characterization of TECA's treatment of the applicability of *INS* v. *Chadha*, 462 U.S. 919 (1983), to the price control program as "cavalier[]" (Pet. 39 n.33) is disingenuous at best. As petitioner well knows, that issue had already been conclusively decided against it by TECA in the court of appeals' comprehensive opinion in *Exxon Corp.* v. *DOE*, 744 F.2d 98 (1984), cert. denied, No. 84-188 (Dec. 3, 1984), and it therefore warranted little discussion here.

review is not warranted.[14]

1. Petitioner argues first (Pet. 27-29, 29-32)[15] that the regulations did not require it to adopt a unit-wide BPCL for Hawkins Field as of January 1, 1975. This argument is completely without merit.

a. The definition of property contained in Section 212.72 was promulgated by the agency in 1973. TECA has consistently held that that regulation, in itself, required the adoption of a unit BPCL immediately upon unitization. See *Pennzoil Co.* v. *DOE,* 680 F.2d 156, 168 (1982), cert. dismissed, 459 U.S. 1190 (1983); *Francis Oil & Gas, Inc.* v. *Exxon Corp.*, 687 F.2d 484, 488, cert. denied, 459 U.S. 1010 (1982); *DOE* v. *Louisiana,* 690 F.2d 180, 190 (1982), cert. denied, 460 U.S. 1069 (1983); *Grigsby* v. *DOE,* 585 F.2d 1069 (1978), cert. denied, 440 U.S. 908 (1979). As TECA explained in *Pennzoil* (680 F.2d at 168):

> "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citation omitted.]

---

[14] Contrary to its repeated suggestions (Pet. i, 1, 2, 25, 42), the mere monetary size of petitioner's violations does not entitle it to further review in the absence of a legal issue of sufficient general significance to warrant this Court's attention. We note also that the constitutional garb in which petitioner dresses what are at bottom mundane challenges to an agency's exercise of discretion and interpretation of its own regulations was donned fairly late in the day. In almost 200 pages of briefs in the court of appeals, petitioner mentioned due process only twice. Cf. Pet. 2, 25, 26, 29, 31 n.29, 32, 42. Not until its petition for rehearing did petitioner expressly make its primary argument in constitutional terms, and then only very briefly (at 25-26). Thus petitioner "continues to shift ground" in this Court just as it did below. Pet. App. 53a n.28; see *id.* at 32a. See generally, *e.g., United States* v. *Lovasco,* 431 U.S. 783, 788 n.7 (1977).

[15] Petitioner Exxon attacks only the finding of liability (questions 1-4). The petitioners in Nos. 85-430, 85-432, 85-440, and 85-444 support the finding of liability and seek review only of the question whether the district court abused its discretion in ordering that the judgment fund be distributed through the several States (question 5). These issues are completely independent.

> The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit.
>
> * * * * *
>
> [I]f upon unitization the "property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

Thus, even if DOE had done nothing further, Section 212.72 alone—which is how the regulations stood at the time that petitioner formed the unit and made its pricing decisions—required petitioner to adopt a unit BPCL for Hawkins Field on January 1, 1975. Pet. App. 38a.

Petitioner makes three responses.[16] First, it contends that the language of Section 212.72 required lease-by-lease accounting at unitized properties. Pet. 6, 27-28. This argument misreads the "plain language of the definition" and would in effect completely rewrite it. *Pennzoil,* 680 F.2d at 169; see *id.* at 168; Pet. App. 27a-29a. Moreover, it rests, like much of petitioner's argument (*e.g.*, Pet. 2, 9, 41), on an unreasonable and one-sided view that the overriding purpose of the price control regulations was to encourage production. As the courts below made clear, that goal was

---

[16] All of these responses miss the point that petitioner's liability rested on its failure to satisfy the more lenient "significant alteration in production" standard of Ruling 1977-2 rather than the immediate unit-wide BPCL requirement of Ruling 1975-15. See Pet. App. 38a, 43a-51a. That petitioner was unable to qualify for the benefits provided by the more lenient standard is no reason to invalidate the agency's construction of its own regulations, which plainly were not intended to provide benefits to all units regardless of circumstances. Cf. *Placid Oil Co.* v. *FPC,* 483 F.2d 880, 905 (5th Cir. 1973), aff'd *sub. nom. Mobil Oil Co.* v. *FPC,* 417 U.S. 283 (1974).

only one of several and scarcely could be given controlling weight in disregard of the fundamental purpose of directly limiting the price increases that were plaguing the nation. See Pet. App. 9a, 175a, 197a, 206a.[17] Petitioner's reading of the regulation would utterly have failed to advance this purpose in a sensible fashion, for it would have allowed the creation on paper of new, higher-priced oil simply by shuffling production from one well to another without any actual increase in production. See pages 3-5, 10-11, *supra.* Indeed, it would have permitted crude oil producers to escape price controls altogether merely by joining forces with their neighbors and pumping all of their joint production out of one well rather than two. Finally, petitioner fails to give due deference to DOE's own interpretation, adopted in several contemporaneous rulings, that Section 212.72 required a unit BPCL immediately upon unitization, an interpretation faithful to the language of the regulation and to the underlying statutory and regulatory purposes. See, *e.g.*, Pet. App. 196a-197a; *Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965) (citation omitted) (" '[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ").[18]

---

[17] One searches in vain through the 42-page petition for even an acknowledgement that one purpose of price controls was to control prices.

[18] The fact that several of the interpretations (unlike Ruling 1975-15) were not published in the Federal Register until 1977 (see note 4, *supra*) does not detract from their probative value in demonstrating the agency's view of what its own regulations required. Of course petitioner could not have been bound by unpublished rulings; the point, however, is that the validly promulgated and published regulation itself required the practice that petitioner refused to adopt. In view of both Ruling 1975-15 and the agency's other contemporaneous interpretations of Section 212.72 to require a unit BPCL immediately upon unitization, petitioner's characterization of this understanding of the regulation as a "later *post hoc* rationalization[] of the agency's litigation attorneys" (Pet. 28 n.26) is contrary to fact.

Second, petitioner appears to suggest (Pet. 28 n.27, 41), although it avoids directly invoking the doctrine, that the government should, in effect, be estopped from enforcing Section 212.72 on the basis of alleged informal oral advice by some agency employees that lease-by-lease accounting of unitized properties was permissible, an argument that petitioner waived in the court of appeals. See Pet. App. 77a-78a n.41. Consistently with this Court's rulings, TECA has repeatedly held, as it did here, that the views of individual officials could not reasonably be relied on as those of the agency and cannot estop the government from enforcing the law. See Pet. App. 33a-34a; *Christmann & Welborn* v. *DOE*, 773 F.2d 317 (1985), cert. denied, No. 85-81 (Oct. 15, 1985); *Pennzoil Co.* v. *DOE*, 680 F.2d at 171-172. See generally, *e.g.*, *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). In any event, it is quite plain that petitioner did not rely on such advice in embarking upon unitization at Hawkins Field, for petitioner obtained the agreement of the other interest owners on the assumption that unit-wide accounting would be required, and it followed that practice at its other units as well. See pages 9-10, *supra*.[19]

Third, petitioner argues that DOE's partial rescission of Ruling 1975-15 in February 1976 vitiates all reliance on the agency's interpretation of Section 212.72 to require unit-

---

[19] Without pausing to acknowledge the findings of the courts below, petitioner baldly asserts that Hawkins Field never would have been unitized had the interest owners known that a unit BPCL was required. Pet. 5-6, 31. The court of appeals expressly rejected this speculation (Pet. App. 40a), and it defies common sense as well as the factual record. Petitioner and the other Hawkins Field interest owners were quite obviously far better off financially once the reservoir was unitized even with the unit BPCL required by Section 212.72 because unitization allowed the production of substantially greater quantities of oil than would otherwise have been possible. See Pet. App. 15a, 40a-41a, 208a-209a n.30.

wide BPCLs. Pet. 27-29. In making this argument, petitioner completely misconstrues DOE's February 1976 ruling. The agency reaffirmed the principle of Section 212.72 and Ruling 1975-15 that unitization normally requires the adoption of a unit BPCL because lease-by-lease comparisons of production are no longer meaningful. 41 Fed. Reg. 4931, 4937 (1976). However, because it recognized that production patterns are not in every case realigned simultaneously with unitization, the agency relaxed the requirement that producers adopt a unit BPCL immediately upon unitization in favor of the "significant alteration in producing patterns" standard, which both was more sensitive to the changes that necessitated adoption of a unit BPCL and increased the incentives for unitization. See Pet. App. 30a-31. The result was a less stringent application of Section 212.72. But the agency most emphatically did not establish the propriety of the lease-by-lease accounting practices followed by petitioner, which resulted in increasing amounts of new oil being reported even as actual production declined. *Id.* at 190a.[20]

[20] The agency made this clear at the time (41 Fed. Reg. at 4937):

> [I]n determining quantities of new * * * crude oil from a unit under the prior regulations, Ruling 1975-15 required that current total production from the unit exceed the total base production control levels for all the participating properties of the unit before any of the unit production qualifies as new crude oil.
>
> This result is dictated by the need to compare current production levels with like quantities of base production control levels in determining whether there has been an increase in production above base period levels. * * * [A] meaningful comparison could not ordinarily be obtained where current production figures from individual leases are compared with BPCL's from those leases, once there has been a realignment of producing patterns such as normally accompanies enhanced recovery. Thereafter, the bulk of the actual production from the unit may be concentrated from only a few producing wells located on fewer than all of the several leases that comprise the unit, and lease-by-lease comparisons would yield no meaningful results in terms of measuring actual

b. Petitioner argues as well (Pet. 29-31) that the new standard for determining the date for calculating new oil on a unit-wide basis embodied in the definition used in Section 212.75 could not be applied retroactively to Hawkins Field.[21] As both courts below noted, the argument is a curious one because invalidation of Section 212.75 would leave petitioner in no better position: it would still have been required to adopt a unit BPCL on January 1, 1975 under Section 212.72, as just discussed. Pet. App. 32a, 227a-228a n.39. In any event, retroactive application of the definition used in Section 212.75 is unobjectionable because it did not prejudice petitioner. Cf. *United States* v. *Caceres*, 440 U.S. 741, 752-753 & n.15 (1979); *American Farm Lines* v. *Black Ball Freight Serv-*

---

increases in production.

> * * * [U]ntil such time as there has been a significant change in producing patterns, [however,] there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.
>
> * * * Once enhanced recovery operations begin [or producing patterns are significantly altered before the actual implementation of enhanced recovery operations], the producer will be required to calculate a unitized BPCL * * *.

[21] Petitioner appears at times to suggest that even under the definition set forth in Section 212.75 or some ill-defined "generic standard," a significant change in producing patterns did not take place on January 1, 1975. See, *e.g.*, Pet. 23 n.21, 32 n.29. However, the record clearly establishes the extent to which petitioner shifted production among leases as of that date, thereby rendering meaningful lease-by-lease comparisons—the only possible "generic" touchstone—impossible. See page 10, *supra*. Moreover, it is undisputed that production allowables and gas injections increased, thereby triggering a unit BPCL requirement under the regulatory definition (contrary to petitioner's contention, the regulations did not require that the injected gas be obtained from sources outside the reservoir, see note 6, *supra*). It would, indeed, have been flatly inconsistent with the statutory purpose for the agency to have permitted the wholly illusory creation of higher-priced new oil for which petitioner argues. See Pet. App. 43a-51a (finding as a matter of law that a significant alteration of producing patterns occurred at Hawkins Field on January 1, 1975).

ice, 397 U.S. 532, 539 (1970); see generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Ruling 1977-2, using the definition in the new Section 212.75, was more favorable to producers than Ruling 1975-15, which strictly applied the old Section 212.72. Moreover, in making its decision to unitize, petitioner relied only on the less favorable prior standard requiring the immediate adoption of a unit BPCL. Pet. App. 38a-41a; see pages 9-10, *supra.*

2. Petitioner argues next (Pet. 32-35) that the additional incentives for unitization provided by the regulations for units formed after February 1976 were irrational. The courts below thoroughly discussed and correctly rejected this contention. Pet. App. 41a-43a, 214a-221a. As the district court noted, petitioner merely "seeks to wage the battle it lost when Section 212.75 was promulgated." *Id.* at 220a. DOE "performed precisely the delicate weighing of competing statutory objectives with which Congress had entrusted it and to which judicial deference is due." *Ibid.* The differing incentives available to units that were formed at different times or not yet formed reasonably balanced the conflicting goals of increasing production and holding down prices by offering additional benefits only to those producers for whom unitization would not otherwise have been profitable. See *DOE* v. *Louisiana,* 690 F.2d at 189. The purpose of Section 212.75 was "to remove any * * * regulatory impediments to the *formation* of units." 41 Fed. Reg. 36172, 36182 (1976). Since it was unnecessary to encourage something already accomplished, it was completely reasonable not to apply the incentive provisions of Section 212.75 to pre-existing units such as Hawkins Field. TECA, which has special expertise in this area, found no basis for setting aside the agency's exercise of discretion. There is no basis (or need, given the fact that the regulations have expired) for this Court to do so either. See generally, *e.g., Capital Cities Cable, Inc.* v. *Crisp,* No. 82-1795 (June 18, 1984), slip op. 15; *Heckler* v.

Campbell, 461 U.S. 458, 466 (1983); *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).[22]

3. Petitioner argues next (Pet. 35-38) that it was denied an opportunity to present a reasonable alternative basis for beginning unit-wide accounting at Hawkins Field. Apparently, petitioner relies on the testimony of "fourteen petroleum engineering experts" concerning the underground drive mechanism of the reservoir and concluding that the most significant change occurred with the injection of inert gas beginning in 1977. See Pet. 17 n.15. Petitioner's argument misses the point. Both courts below fully credited petitioner's evidence. They properly concluded, however, that there was no factual dispute to be decided because petitioner's proferred alternative date was unreasonable as a matter of law. Pet. App. 52a-55a, 226a-227a n.38. Accordingly, no factual hearing was required. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973).[23]

The unreasonableness of petitioner's suggested date is apparent at once. Petitioner extensively realigned production patterns at Hawkins Field beginning on January 1, 1975. See page 10, *supra*; Pet. App. 46a, 228a-229a. As the district court explained, petitioner's "own measurements and analysis of production shifts at Hawkins Field show[ed] the dramatic changes that occurred in 1975," in-

---

[22] In any event, as the courts below noted, petitioner's attack, if successful, would result only in the invalidation of certain of the benefits provided by Section 212.75, not the extension of those benefits to petitioner. Pet. App. 43a n.17, 219a n.35.

[23] Petitioner's grandiose invocation (Pet. 35-36) of the *Accardi* doctrine, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is irrelevant. Nothing in the agency's regulations provided that a completely meaningless factual hearing must be held where the producer's suggested alternative date fails as a matter of law. See also Fed. R. Civ. P. 56 (providing for summary judgment where there is no issue of material fact).

cluding a shift of "almost 20 percent of 1975 production * * * across lease lines, almost two and one-half times as much as had shifted in either 1974 or 1973." *Id.* at 229a-230a n.42. It was this substantial shift in production that allowed petitioner to claim most of its new oil even though total production from the field had not in fact increased, a result prohibited by the letter, and antithetical to the purposes, of the price control program. The agency had in fact repeatedly made crystal-clear that shifts such as those caused by petitioner at Hawkins Field rendered meaningful lease-by-lease comparisons impossible and therefore required the adoption of a unit BPCL. See, *e.g.*, *id.* at 53a; note 20, *supra.*

In short, petitioner's " 'realignment of the pattern of production would have played havoc with the federal pricing system had [the agency] permitted lease by lease property designations to continue in force after a unitization [because] [i]t would have resulted in the recognition of artificially high quantities of new oil from some of the participating leases while other leases would be producing less or not at all.' " Pet. App. 54a (citation omitted). The underground drive mechanism of the reservoir is thus irrelevant and, in any event, too complex and amorphous to be relied upon as a workable regulatory standard. *Id.* at 54a-55a, 226a n.38.

4. Petitioner lastly takes issue (Pet. 38-41) with the amount of the judgment. Petitioner's reliance on the supposed equities in its favor is, as the court of appeals observed, for the most part "simply a recasting of its unsuccessful claim * * * that the Government was estopped from challenging the legality of lease-by-lease accounting." Pet. App. 77a. Contrary to petitioner's argument, the courts below fully considered the relevant mitigating factors; indeed, the district court, after "careful consideration of the voluminous record," declined to assess civil penalties against petitioner. *Id.* at 259a-260a.

By the same token, however, the district court refused "to excuse [petitioner's] behavior." *Id.* at 260a. As the district court noted, petitioner's pricing practices "ignor[ed] [the] unequivocal dictates of the regulations" and departed from petitioner's own construction and application of the regulations at its other units. *Ibid.* The court of appeals adopted the findings of the district court in this regard, *id.* at 77a, and they plainly warrant no further review.[24]

Petitioner's argument that its liability should have been limited to its own production from Hawkins Field was correctly rejected by TECA (Pet. App. 55a-61a) on the basis of that court's prior precedents. Moreover, this Court has recently declined to review the identical contention in *Christmann & Welborn* v. *DOE,* 773 F.2d 317 (Temp. Emer. Ct. App. 1985), cert. denied, No. 85-81 (Oct. 15, 1985); see also *Sauder* v. *DOE,* 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981). There is no reason for a different result here.

Petitioner, which owned approximately 80% of the working interest in Hawkins Field, was the moving force behind unitization and the dominant force after unitization. Its liability rests on the fact that petitioner "caused the overcharges" throughout the unit and is therefore "fully liable for all of them." Pet. App. 55a. As sole operator of the unit, petitioner made all production and pricing decisions (*id.* at 57a (quoting district court's opinion)):

"[Petitioner] chose the wells to shut-in, the wells

---

[24] Petitioner's challenge to the award of prejudgment interest rests on the same " 'considerations of fairness' " that it urges in mitigation of the award generally. Pet. 40-41 (quoting *Board of County Commissioners* v. *United States,* 308 U.S. 343, 352 (1939)). The argument was properly rejected by both courts below. Pet. App. 71a-76a, 258a-259a. Similarly, petitioner's suggestion that consumers were not injured by its overcharges (Pet. 39) ignores the fact that, "because of the nature of the Entitlements Program, and the price control regulations, the effect of [petitioner's] wrong had been spread throughout the distribution chain, to the ultimate consumers." Pet. App. 78a; see pages 28-29, *infra.*

> where production was to go up or down, where to inject gas, and how much. . . . Most important, [petitioner] decided how the unit would account for upper and lower tier oil, first in 1974, before the field was legally unitized . . . later after Ruling 1975-15 was issued, . . . and finally when it switched to a unit BPCL under Section 212.75 in September 1976."

Thus, "[t]he undisputed evidence * * * supports the conclusion that [petitioner] is responsible for all of the overcharges." *Ibid.*[25]

TECA correctly concluded that operator liability is in accordance with the scheme established by Congress and is necessary to avoid a multiplicity of actions across the country against the almost 2500 owners of interests in Hawkins Field, which would " 'plunge the agency into an "administrative quagmire" * * * [and] effectively block enforcement of oil price controls at Hawkins Field.' " Pet. App. 57a (citations omitted). This conclusion by TECA, the court most familiar with the regulatory program at issue in this case, see *Tully* v. *Mobil Oil Corp.*, 455 U.S. at

---

[25] Petitioner's argument (Pet. 39) that it cannot be held liable for overcharges attributable to Texaco's production from Hawkins Field was correctly rejected by TECA because the "uncontested facts established that [petitioner] did 'cause' th[ose] overcharges" as well as all of the others at the Hawkins Field Unit. Pet. App. 62a. Petitioner also renews in this Court (Pet. 23-24 n.22) a contention that TECA correctly ruled had not been properly preserved for appellate review (Pet. App. 66a-67a) concerning whether a small amount of the judgment had inadvertently been based on production from outside Hawkins Field. This claim apparently relates to production by a few owners whose tracts were in fact within the unit but who had not signed the unit agreement, production that in our view is properly encompassed within the judgment. In reviewing the record, we have not ascertained that any sales from tracts not within the Hawkins Field Unit were included in the judgment. In any event, petitioner's argument would have been more appropriately addressed to the lower courts through a motion to alter or amend the judgement had petitioner not already waived it.

248, is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

5. Finally, the petitioners in Nos. 85-430, 85-432, 85-440, and 85-444[26] argue that the district court abused its discretion in ordering that restitution of Exxon's overcharges be made through the several States rather than allowing consumers and direct and indirect purchasers of crude oil to attempt to prove that they suffered actual and quantifiable losses as a result of Exxon's violations. These petitioners intervened only very late in the day in the district court and offered little support there for the contentions that they now press.[27] Although for the most part they do not now detail the basis on which they are entitled to the overcharges, the remedy petitioners—which include refiners, distributors, and ultimate consumers of crude oil—offered in the court of appeals competing and

---

[26] We refer to these parties as the "remedy petitioners."

[27] After the district court had taken the full case under advisement following completion of briefing and oral argument, two groups moved to intervene with respect to the remedy for Exxon's overcharges. One was a group of crude oil refiners that conceded that the remedy issue was a purely legal question capable of resolution by summary judgment on the existing record. See R. 38337. The other was a group of independent gasoline retailers that did not offer any evidence or request a hearing. See R. 38986. After entry of judgment, various other groups sought to intervene. The district court granted each application to intervene for purposes of appeal. Pet. App. 82a n.45, 130a-134a. Given the content and timing of the remedy petitioners' motions in the district court, the full consideration of their arguments by the court of appeals, and the legal nature of the question of the district court's authority to adopt the restitutionary remedy that it ordered, there is no doubt that the remedy petitioners were afforded ample opportunity to be heard. Indeed, many of their arguments should properly be considered waived in view of the proceedings in the district court.

mutually contradictory theories for why each of them has the most compelling claim to the award.

a. The district court's order represents an unexceptional exercise of its broad equitable discretion to make restitution in a workable manner consistent with the goals of the statutory and regulatory scheme. TECA affirmed on the basis of its understanding of the operation of a complex set of regulations, no longer in effect, that governed pricing decisions in the petroleum industry. The court of appeals simply upheld one possible remedy as having appropriately been adopted in this case, without mandating the same approach in future cases. Moreover, the remedy adopted by the district court has no application outside the narrow confines of the now-defunct price control program because of the special nature of the government's cause of action and the unusual operation of the regulations at issue. See, *e.g.*, *In re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586, 592-593 (D. Kan. 1983) (noting differences between public price control and private antitrust actions). Finally, DOE recently has developed a restitutionary policy and proposed legislation that would apply to overcharges recovered in other oil price control cases. See 85-444 Pet. App. B1-B10, B14, B19-B22. In view of the factbound nature of the decision below, the procedural circumstances in which it was made, and its lack of continuing importance, further review by this Court is not warranted.

b. In any event, the remedy fashioned by the district court is well within the broad scope of its remedial power " 'to do equity and to mould [its] decree to the necessities of the particular case.' " *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), quoting *Hecht Co.* v. *Bowles,* 321 U.S. 321, 329 (1944). Under the "Entitlements Program" then in effect, refiners with proportionally greater access to lower-priced old oil were required to make cash payments to refiners with relatively less access to such oil. In this way, the regulations "spread the benefits of access

to old price-controlled oil and the burden of dependence on uncontrolled oil among all sectors of the petroleum industry, all regions of the country, and among all consumers of petroleum products." *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); see Pet. App. 87a-88a. 247a-248a. Other regulations permitted refiners to pass through increased costs to their customers. Pet. App. 87a-89a, 249a. "As a result of the pervasive system of price controls which then existed, therefore, Exxon's overcharges * * * were borne by ultimate consumers of petroleum products throughout the entire country." *Id.* at 249a (footnote omitted).[28]

It is little wonder then that both courts below found that "[t]he broad scattering of the ill effects of Exxon's wrongdoing renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." Pet. App. 250a.[29] As the court of appeals concluded, "any attempt to trace increased costs attributable to the [Hawkins Field] overcharges

---

[28] Certain of the remedy petitioners argue (*e.g.*, 85-430 Pet. 23) that this conclusion is questionable in light of the decontrol of prices of certain petroleum products before 1981. The absence of a specific regulation permitting refiners to pass through increased costs for those products, however, does not mean that the additional costs were not in fact passed through, nor does it simplify the ultimate task of identifying the actual victims of Exxon's overcharges and the extent of their injury. See generally *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968) (noting difficulty of determining actual effect of price change "in the real economic world rather than an economist's hypothetical model").

[29] Indeed, it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible. See Memorandum in Support of Conditional Motion of Indicated Refiners to Intervene 5, R. 38973 ("it is impossible to trace the impact of the overcharges directly to any subsequent purchasers"); Memorandum of National Freight et al. in Support of Motion to Intervene 2, R. 38547 ("it is administratively impracticable to attempt to entertain specific claims based on specific overcharges to identified customers"); Gladieux Br.

would require a full scale audit of the entire petroleum industry, and * * * any effort to do so would be futile." *Id.* at 88a. There is no basis for this Court to set aside this concurrent conclusion of both TECA and the district court.[30]

Nor is there any basis on which to disagree with TECA's

---

9 ("[n]o such findings could possibly be made without an extremely time-consuming factual inquiry, one which is almost certainly beyond the capacity of any Court or administrative agency"); Marathon Br. 17 ("proving passthrough of overcharges would depend entirely on uncertain economic assumptions and impossibly complex measurements").

[30] The remedy petitioners rely on a report issued by DOE's Office of Hearings and Appeals (OHA) in another case (85-432 Pet. App. A321-A385) to argue (*e.g.*, 85-432 Pet. 13-14) that econometric modeling techniques are available that could identify within a broad range the percentages of overcharges that were absorbed by refiners. As OHA itself made clear, however (*e.g.*, 85-432 Pet. App. A343), and as DOE has reaffirmed, these figures "say [] nothing about the amount of the overcharges any particular refiner may have absorbed. * * * [S]ome refiners necessarily will have absorbed amounts less than the average while others obviously absorbed more." 85-444 Pet. App. B3 (DOE Statement of Restitutionary Policy). Thus, "any matching between the amount a particular refiner receive[d] and the amount of harm [that it] suffered * * * [would be] purely coincidental." *Id.* at B4. Moreover, "refunds based upon the econometric method developed by OHA would entail considerable administrative costs and very long delays before distribution. It could require further hearings or an individual claims procedure where innumerable direct purchasers could be given an opportunity to substantiate their individual claims. * * * The appropriateness of the burden, cost and delay of these further proceedings is problematic in view of the small percentage of the overcharges that would actually be distributed under such a method." *Id.* at B5-B6. Finally, even OHA's modeling estimates entailed "great inexactitude." *Id.* at B4; see 85-432 Pet. App. A383 (concluding that refiners as a class may have absorbed as little as 2.7% or as much as 8.1% of the overcharges). Certainly no court should be *required* to undertake the expense and delay of a claims procedure based on econometric models so inherently imprecise.

In a supplemental brief in support of their petition in No. 85-430, Marathon Petroleum Co., et al. (Marathon) attack OHA's actual report, primarily on the basis of correspondence from a Member of

conclusion that the remedy adopted by the district court is "equitable and fair, and a reasonable method of compensating the consuming public for the [Hawkins Field] overcharges." Pet. App. 91a. The district court modeled its remedy on the one adopted by Congress in the Warner Amendment, Pub. L. No. 97-377, § 155, 96 Stat. 1919-1920 (85-432 Pet. App. A316-A319), with respect to restitution of other petroleum overcharges. Pet. App. 254a-256a.[31] By earmarking funds for specific energy conservation programs, the Warner Amendment was designed "to benefit the class of persons injured by [oil price control] violations." 85-432 Pet. App. A316. Congress recognized that these conservation programs benefit the public at large by reducing our dependence on foreign oil. See S. Rep. 94-1119, 94th Cong., 2d Sess. 52 (1976); see also Pet. App. 256a. The remedy in this case thus "accomplishes the intent of Congress" (Pet. App. 91a) by

---

Congress concerning an earlier draft of the report that was not adopted. TECA correctly rejected Marathon's eleventh-hour attempt to interject this incompetent and irrelevant evidence into the record (85-430 Supp. Br. App. 1a), and there is no reason for this Court to do otherwise. The OHA report recently was issued in a completely separate case and was not cited by either court in this action. See Pet. App. 80a n.43. The unsubstantiated allegations on which Marathon relies therefore could not possibly affect the outcome of the instant case.

[31] Contrary to the remedy petitioners' argument (*e.g.*, No. 85-430 Pet. 19), Congress did not intend through the Warner Amendment to prohibit courts from adopting similar restitutionary remedies in other cases. See 128 Cong. Rec. S15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy). There is neither an express nor an implied indication in the Warner Amendment that Congress intended to limit the broad remedial authority inherently possessed by the courts in cases of this kind, see *Porter* v. *Warner Holding Co.*, 328 U.S. at 398, a limit that would have been a simple matter to articulate had Congress desired to do so. Finally, the district court made it clear that it was not relying on any implication of authority in the Warner Amendment itself but only on its "broad equitable powers to order restitution." Pet. App. 256a (footnote omitted).

helping "to relieve consumers of some of the burden of towering oil costs" (*id.* at 256a), a burden that was increased by "[t]he colossal scale of Exxon's wrongdoing" (*ibid.*). As TECA concluded (*id.* at 92a (footnote omitted)):

> While other remedies might have been adopted by the trial court, the remedy chosen avoids further administrative delay and confusion, with additional costs, it prevents the frustration of congressional objectives in securing prompt enforcement of what has been denominated as "emergency" price regulations, and it is a reasonable means to protect the public interest.

There is simply no warrant for upsetting the reasoned exercise of discretion affirmed below.

c. The remedy petitioners contend, however, that the failure of the courts below to permit them to present evidence of the fact and amount of their actual injuries was inconsistent with due process and restitutionary principles. This argument is completely without merit. This case is a government enforcement action pursuant to Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. As TECA repeatedly has emphasized, "[a]ctions by the United States under ESA Section 209 are taken to enforce public, not private rights." Pet. App. 82a-83a (quotation marks and citations omitted). Section 209 does not create a cause of action on behalf of private persons who were injured by violations of the petroleum price regulations—that was provided by Congress in Section 210 of the Act, which is not at issue here. Because the remedy petitioners were not entitled to recover damages by way of restitution in this action, due process did not require that they be permitted to present evidence in support of their claims. Indeed, as the court of appeals noted, they were not even proper intervenors as of right. Pet. App. 83a (quoting *Cities Service Co.* v. *DOE*, 715 F.2d 572, 573-574 (Temp. Emer. Ct. App. 1983)). Cf. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689

(1961); see also, *e.g.*, *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1969). The remedy petitioners thus were afforded ample, or more than ample, process by being permitted to raise their arguments below; nothing in the Due Process Clause requires that those arguments be accepted.

The cases on which the remedy petitioners rely (*e.g.*, 85-430 Pet. 12, 16) are unavailing. None of these cases establishes a protected property interest in a restitutionary fund that results from a government enforcement proceeding or otherwise requires that such a fund be distributed, whatever the administrative costs, on an individual basis to persons claiming to be the ultimate victims of illegal private activity. In *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949), for example, funds had been paid into the court of appeals pursuant to that court's stay of an administrative order reducing natural gas rates. This Court held that, to the extent possible without "prolonged litigation," the court of appeals was required to "determine who suffered a loss as a result of the court's action in granting the stay." *Id.* at 584. Nothing in the Court's opinion purports to impose a duty on courts of equity to hold proceedings to attempt to identify the ultimate victims of an overcharge (especially one not resulting from an erroneous court order) where that has reasonably been determined to be impossible. Similarly, in *Porter* v. *Warner Holding Co., supra,* the Court held only that federal courts possess inherent equitable authority to order that a landlord's overcharges, which violated the Emergency Price Control Act of 1942, be restored to its tenants. The Court did not undertake to limit that equitable authority in the manner for which the remedy petitioners contend.

In sum, the restitutionary remedy under Section 209 is a government enforcement mechanism whose "central purpose * * * is to determine the amount by which the wrong-

doer has been unjustly enriched, and then to make him disgorge that amount." *Citronelle-Mobile Gathering, Inc.* v. *Edwards,* 669 F.2d 717, 722 (Temp. Emer. Ct. App.), cert. denied, 459 U.S. 877 (1982).[32] Section 209 "is not designed to provide redress for a victim who has suffered an injury because of a violation of a [price control] regulation." *Bulzan* v. *Atlantic Richfield Co.,* 620 F.2d 278, 282 (Temp. Emer. Ct. App. 1980). If compensation results, it is only as a "by-product of the agency's effort to reestablish compliance with its regulatory scheme." *Ibid.* Accordingly, Section 209, which evinces no intention "to limit the power of the courts or the agency * * * to a particularly strict interpretation of restitution," *Sauder* v. *DOE,* 648 F.2d at 1348, neither establishes in private persons an entitlement to disgorged funds nor requires a wasteful and ultimately futile attempt to determine the extent to which various persons or groups of persons were injured. While the district court was not compelled to shape the remedy precisely as it did, it acted well within its discretion by patterning the remedy after one established by Congress and directing that the funds be used in a manner that will help to undo the damage caused by the regulatory violations in this case.

---

[32] TECA carefully distinguished the factual circumstances presented here from those in *Citronelle-Mobile,* which, it observed, involved only a single refiner, a single product, and identifiable customers. See Pet. App. 85a-87a. Even if the remedy petitioners were correct in contending (*e.g.,* 85-432 Pet. 24) that there is a conflict between that case and this one, the existence of such an intra-circuit conflict, which TECA is well able to resolve in the future, would be an argument against, not for, review here. *Wisniewski* v. *United States,* 353 U.S. 901, 902 (1957).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

THOMAS C. NEWKIRK
Chief Counsel
Economic Regulatory Administration
Department of Energy

DECEMBER 1985

---

* The Solicitor General is disqualified in these cases.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1985—491-507/20108

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-444

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL FREIGHT, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

On Petition for Writ of Certiorari
to the Temporary Emergency Court of Appeals
of the United States

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*Philip P. Kalodner
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

Attorney for Petitioners

DATED: January 8, 1986

**Counsel of Record*

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

REPLY AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

I. The Merits of the Petition Seeking Remand on the Remedy Issue Fully Justify Reversal 1

II. The Remedy Determination Is of Precedential Significance 5

CONCLUSION 6

APPENDIX J

Proposed Legislation, Pennsylvania C-1

APPENDIX K

Portions of the April 1, 1985 Report of the Office of Hearings and Appeals, Department of Energy C-9

APPENDIX L

Excerpt from Memorandum of Petitioners in Support of Motion for Intervention C-25

TABLE OF AUTHORITIES

Page

Comptroller General's Report B-214953 GAO/RCED 85-46 (Feb. 14, 1985) 4

Office of Hearings and Appeals, DOE Report to the U.S. Dist. Ct., Kansas: In re Department of Energy Stripper Well Exemption Litigation, MDL 378 4

Pub. L. No. 97-377 §155, 96 Stat. 1830, 1919 (Warner Amendment) ..... *passim*

Proposed Senate Bill No. 1277, Pennsylvania 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-444

NATIONAL FREIGHT, INC., *et al.*,

*Petitioners**

v.

UNITED STATES OF AMERICA, *et al.*

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The purpose of this Memorandum is both to reply to the Briefs in Opposition filed by the United States and State Respondents, and to supplement the Petition by calling the Court's attention to recent developments bearing on the grant of certiorari.

I. THE MERITS OF THE PETITION SEEKING REMAND ON THE REMEDY ISSUE FULLY JUSTIFY REVERSAL

The Oppositions rely upon misrepresentation of the record (i) as to the nature of the remedy as to which review is sought, (ii) as to the possibility of accomplishing the statutory goal of restitution, and (iii) as to the procedural context in

*There are no parent companies, subsidiaries other than wholly owned subsidiaries, or affiliates of either RJG Cab Inc. or National Freight, Inc.

which Petitioners and others were denied their due process procedural rights.

1. The remedy was not to use the funds "in a manner that will help to undo the damage caused by the regulatory violations in this case" (Brief for the United States in Opposition, at 34). It was, instead, to help a small segment of the population, the poor, who heat with natural gas, to pay home heating bills. (As noted in the Petition, natural gas is not derived from the oil as to which the overcharge funds relate, Petition at 8). So the District Court, at least, acknowledged by explaining that the selected programs operate to "relieve consumers of some of the burden of towering oil costs . . . either by reducing overall consumption through conservation or by *direct financial assistance to those most in need.*" (Appendix in No. 85-432 at A-274, emphasis supplied). In opting for a program to benefit the poor, the District Court was indeed respecting "the wisdom of the solution chosen by Congress" in appropriating $200 million of overcharge refunds in the Warner Amendment, §155, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982), and determining to "adopt it as the most appropriate equitable remedy in the circumstances of this case." (Appendix in No. 85-432 at A-274). No one can read the Congressional debate on the Warner Amendment and have any doubt that its motivation and purpose was to provide funds to assist the poor in payment of home heating bills rapidly increasing by virtue of increases in the prices of natural gas in the winter of 1982. And, if any confirmation be needed of the intent of Congress, it is provided by the fact that the program to assist the poor in payment of utility bills is the dominant program of the five named by Congress in the Warner Amendment, and by the District Court here as the programs for which the funds could be spent. (For the appropriate Congressional record references and computations, see Petition in No. 85-444 at 7-9).

2. An effort to accomplish restitution to those injured by the Exxon overcharges does not involve an inquiry process which is either "wasteful" or "ultimately futile" (United States Opposition at 34). The proof of that pudding is that the De-

partment of Energy's Office of Hearings and Appeals has largely completed such an inquiry in connection with similar crude oil overcharges, and has concluded that restitution is possible. (See discussion below at 4).

3. Finally, the argument that Petitioners are not entitled to their right to restitution because they "intervened only very late in the day in the district court and offered little support there for the contentions that they now press" (United States Opposition at 27) ignores the critical facts that (i) the District Court misled prospective intervenors by promising to defer consideration of remedy, and then failed to do so, and (ii) the limitation of the right of Petitioners to participation in the Appeal was the Court's idea, not Petitioners'. (See Petition in No. 85-444 at 22-23).

Two recent developments demonstrate anew both the extent to which the remedy selected will divert the funds from the statutory goal of restitution, and the possibility of accomplishing that statutory goal:

A. Legislation introduced in Pennsylvania, the home state of Petitioners RJG Cab Inc. and Geraldine H. Sweeney, to appropriate the funds to be received in this case provides that 75% of the funds are to be expended to benefit poor persons, with 25% to be expended for other conservation projects. (Appendix J). A report of the Comptroller General as to the planned use of the Warner Amendment funds indicated that Pennsylvania intended only to spend approximately 45% of the funds received for assistance to the poor. (Report of the Comptroller General B-214953, GAO/RCED 85-46 dated February 14, 1985)*. In its plans for Warner Amendment expenditures Pennsylvania was fairly typical of the ten states studied by the Comptroller General, who, on average, planned to expend some 40% of the funds received for the poor. The increase in percentage to be spent for the poor in the case of a fund here which is approximately 10 times the fund available through the Warner Amendment is to be expected by virtue of the inherent limitations in the amounts which can be ex-

---

*A copy of the Report has been lodged with the Clerk.

pended for the non-poor programs; another indication of the same phenomenon is that Congress has now deleted for current funding two of the five programs, and that two of the three remaining programs involve assistance to the poor. (Petition, at 8) Thus, it is clear that the Congressional intent in adopting the Warner Amendment to benefit the poor and the District Court's acknowledgement in the instant case that its remedy would emphasize "direct financial assistance to those most in need" will indeed be implemented, even to a greater extent than in the case of the Warner Amendment funds, should the remedy determination here remain undisturbed.

B. The only tribunal which has heard evidence on the possibility of developing a restitution plan as to crude oil overcharges as are here involved, the Office of Hearings and Appeals of the Department of Energy (OHA) has (i) specifically rejected the argument that it is impossible, the basis of the determination by the District Court not to try and (ii) has indeed recommended and outlined a plan of restitution. The Petition for Certiorari filed in No. 85-432 argued inferentially from the publicly filed OHA report of June 21, 1985. However, what Petitioners did not then know, but what is now revealed, is that OHA specifically so determined in its initial report of April 1, 1985, and that the deletion of such specific findings was after consultation with senior DOE officials who desired to divert crude oil overcharge refunds to the U.S. Treasury, either to relieve a specific demand upon the Treasury, as in connection with funding for assistance to the poor for home heating oil costs, or to reduce the federal deficit. (The two principal sections of the first OHA report which were deleted prior to the filing of the report of June 21, 1985 which is reprinted in the Appendix in 85-432 at A-329 et seq., are set forth in Appendix K hereto. The full text of the April 1 Report has been lodged with the Clerk by petitioners in No. 85-430.)

The United States attempts to bolster its argument of "impossibility" by asserting that "it was admitted by many of the parties below that any attempt to trace the overcharges would be impossible." United States Opposition, footnote 29 at

29. Since, as OHA found after hearing the evidence, "a precise tracing ... through an individual refiner's operations would not be probative of the question before us" of the injury absorbed at the various distribution levels (Appendix in No. 85-432 at A-339-340), whether tracing is possible is of no significance. The language quoted by the United States from the Motion to Intervene filed by these Petitioners is blatantly out of context. The portion of the memorandum in which the quotation occurs is set forth in Appendix L hereto.

II. THE REMEDY DETERMINATION IS OF PRECEDENTIAL SIGNIFICANCE

The United States argues that the remedy determination is of no precedential significance because of the "factbound nature of the decision below" and "the procedural circumstances in which it was made". (United States Opposition at 28) The argument misses the points made in the instant Petition for Certiorari:

1. The District Court's acknowledged intent of assisting the poor, as Congress had also intended in connection with the Warner Amendment, establishes the precedent that a court faced with the equitable duty of restitution may either (i) determine its own social priority and use the funds accordingly, or (ii) defer to Congress in the determination of a judicial remedy. The precedent of judicial social legislation threatens to substitute the social philosophy of a judge for the rule of law, and the precedent of deference to Congress encourages Legislative interference with the Judicial power in violation of the Constitutional principle of separation of powers.

2. The District Court's denial of the right of Petitioners to participate, by deferring intervention on the promise that the remedy issue would be deferred and then determining remedy without notice, creates a precedent for the denial of effective intervention to those entitled to intervene as a matter of right. Evidently, even the Solicitor General is concerned about such a precedent. He makes a point of arguing at length

that those entitled to restitution have no right to intervene, but bases his argument on a determination that it is impossible to develop a restitution plan. (United States Opposition at 32-33) As already noted, the deficiency in this argument is that the District Court here did not try to develop a restitution plan, assuming in advance that it was impossible, and the only tribunal that did try, OHA, concluded that it was possible.

CONCLUSION

The Petition for Certiorari should be granted as to the issue of remedy. The merits justify reversal and the remedy decision below is of precedential significance.

Respectfully submitted,

PHILIP P. KALODNER*
900 Bourse Building
Independence Mall
Philadelphia, PA 19106
(215) 592-8788

DATED: January 8, 1986

**Counsel of Record* *Attorney for Petitioners*

APPENDIX J

Printer's No. 1712

THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

NO. 1277
Session of 1985

INTRODUCED BY STAUFFER, JUBELIRER, LOEPER, MOORE, REIBMAN, HESS, ZEMPRELLI, BRIGHTBILL, SHUMAKER, KRATZER, ROCKS, STAPLETON, LEWIS, FUMO, LINCOLN, JONES, SINGEL, ROMANELLI, MELLOW, BODACK, EARLY, HANKINS, ANDREZESKI AND O'PAKE, DECEMBER 17, 1985

REFERRED TO APPROPRIATIONS, DECEMBER 17, 1985

AN ACT

Establishing a special fund for moneys received by the Commonwealth as a result of oil overcharge settlements; designating certain low income energy conservation and assistance programs for funding from this special fund; and making appropriations.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the Energy Conservation and Assistance Act.

Section 2. Legislative findings.

The General Assembly hereby finds and declares that:

(1) There are and will be funds available to the Commonwealth due to settlements of litigation and administrative proceedings brought by the United States Department of Energy against oil companies and refineries for alleged violations of the Federal Petroleum Price Allocation Regulations.

(2) In accordance with the settlements, there moneys are to be distributed to the states for specific energy conservation and assistance programs.

(3) In recognition of the economic plight of low income persons in this Commonwealth, the high and rising costs of energy, and the substantial reduction in energy consumption which is known to result from effective weatherization, the General Assembly considers it sound public policy to provide additional funding for weatherization for low income persons, energy assistance for low income persons, and other conservation programs as specified in this act, and further declares that oil overcharge funds shall be utilized to pay the costs of such programs.

Section 3. Definitions.

The following words and phrases when used in this act

shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Energy conservation and assistance programs." Includes any of the following:

(1) The programs established under Part A of the Energy Conservation in Existing Buildings Act of 1976 (Public Law 94-385, 42 U.S.C. §6861 et seq.), establishing the Low Income Weatherization Program.

(2) The programs established under Part D of Title III of the Energy Policy and Conservation Act (Public Law 94-163, 42 U.S.C. §6321 et seq.), providing for state energy conservation programs.

(3) The programs established under Part G of Title III of the Energy Policy and Conservation Act, providing for energy conservation investments in schools and hospitals.

(4) The programs established under the National Energy Extension Service Act (Public Law 95-39, 42 U.S.C. §7001 et seq.), providing for, inter alia, Energy Conservation Outreach Programs to small businesses and individual consumers.

(5) The programs established under the Low Income Home Energy Assistance Act of 1981 (Public Law 97-35, 42 U.S.C. §8621 et seq.), providing for energy assistance to low income households.

"Fund." The Energy Conservation and Assistance Fund established in section 4.

"Household." Any individual or group of individuals who are living together as one economic unit and whose residential energy is customarily purchased in common or who make undesignated payments for energy as part of a rental payment. A roomer and boarder who is related to any member of the applicant household is considered to be a member of the household.

Section 4. Establishment of special fund.

There is hereby created an Energy Conservation and

Assistance Fund. All funds made available to the Commonwealth after December 1, 1985, due to settlements of litigation or administrative proceedings brought by the United States Department of Energy against oil companies and refineries for alleged violations of the Federal Petroleum Price Allocation Regulations shall be credited by the Treasury Department to this fund. Interest earned by investment of moneys in this fund by the Treasury Department shall also be credited by the Treasury Department to this fund.

Section 5. Supplemental low income energy conservation and assistance programs.

(a) Establishment of programs.—The following supplemental low income energy conservation and assistance programs are hereby established:

(1) Pennsylvania Supplemental Low Income Weatherization Program. This program shall supplement the programs set forth in paragraph (1) of the definition of "energy conservation and assistance programs" in section 3.

(2) Pennsylvania Supplemental Low Income Energy Assistance Program. This program shall supplement the programs set forth in paragraph (5) of the definition of "energy conservation and assistance programs" in section 3.

(b) Eligibility requirements.—Households applying for benefits under the programs established in subsection (a) shall meet the following eligibility requirements:

(1) Households to be eligible will be those dwelling units which are occupied by persons with annual income at or below 150% of the Federal Poverty Guidelines or contain a member who has, during the past 12 months, received cash assistance under Title IV or XVI of the Social Security Act (Public Law 74-271, 42 U.S.C. §§601-662) and section 2605(b)(2) of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35, 95 Stat. 357).

(2) In addition to the income eligibility requirements specified in paragraph (1), households applying for benefits under this act shall meet the eligibility requirements for energy assistance as provided for by the Omnibus Budget Reconciliation Act of 1981, pursuant to the authority of section 201(2) of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code.

(c) Administration of programs.—The programs established in subsection (a) shall be administered as follows:

(1) The Pennsylvania Supplemental Low Income Weatherization Program established in subsection (a)(1) shall be administered by the Department of Community Affairs in a manner consistent with Part A of the Energy Conservation in Existing Buildings Act of 1976 (Public Law 94-385, 42 U.S.C. §6861 et seq.). Community action agencies, existing low-income weatherization providers or, other county, municipal or nonprofit corporations may apply for a portion of these funds. The Department of Community Affairs may establish regulations necessary for administering this program.

(2) The Pennsylvania Supplemental Low Income Energy Assistance Program established in subsection (a)(2) shall be administered by the Department of Public Welfare in a manner consistent with the program authorized under the Low Income Energy Assistance Act of 1981 (Public Law 97-35, 42 U.S.C. §8621 et seq.). The Department of Public Welfare may establish regulations necessary for administering this program.

Section 6. Administration of certain energy conservation and assistance programs.

The energy conservation and assistance programs set forth in paragraphs (2), (3) and (4) of the definition of "energy conservation and assistance programs" in section 3 shall be administered by the Governor's Energy Council. The council may establish regulations necessary for administering these programs.

Section 7. Administrative costs.

No more than 10% of the annual appropriation for each of the energy conservation and assistance programs, including the supplemental programs established in section 5, shall be used for the planning and administrative costs of these programs.

Section 8. Annual report and audit.

The Department of Community Affairs, the Department of Public Welfare and the Governor's Energy Council shall each provide the General Assembly with an annual report, which shall include an independent audit, on or before September 15 of each year, covering all expenditures made in administering their respective programs pursuant to this act.

Section 9. Allocation of annual appropriations.

(a) General rule.—Appropriations from the fund shall be made only for the energy conservation and assistance programs, including the supplemental programs established in section 5, set forth in this act.

(b) Restriction.—At least 75% of the annual appropriations made from the fund shall be for the supplemental programs established in section 5.

Section 10. Appropriations.

(a) Department of Community Affairs.—The sum of $10,000,000, or as much thereof as may be necessary, is hereby appropriated from the fund to the Department of Community Affairs for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(b) Department of Public Welfare.—The sum of $10,000,000, or as much thereof as may be necessary, is hereby appropriated from the fund to the Department of Public Welfare for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(c) Governor's Energy Council.—The sum of $5,000,000, or as much thereof as may be necessary, is hereby appropri-

ated from the fund to the Governor's Energy Council for the fiscal year July 1, 1985, to June 30, 1986, for the purposes set forth in this act.

(d) Lapse.—Any funds unexpended, uncommitted and unencumbered as of June 30, 1986, shall lapse and shall be available for appropriation from the fund for future fiscal years.

Section 11. Effective date.

This act shall take effect immediately.

APPENDIX K

(Following is a copy of the cover page of the April 1, 1985 OHA Report and excerpts. The full text has been lodged with the Clerk by Petitioners in 85-430.)

draft

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

In re Department of Energy	)	
Stripper Well	)	No. MDL 378
Exemption Litigation	)	

Report of the

Office of Hearings and Appeals

of the Department of Energy

V. STANDARDS FOR THE FACT-FINDING PROCESS

An important group of threshold issues concerns the nature of the burden of persuasion and the other, related evidentiary standards that should govern the fact-finding mission referred by the court. These issues are discussed below.

At the outset, we need to reiterate the reasons why the fact-finding process can only measure the impact of the MDL 378 overcharges on the domestic refining industry as a whole, rather than trace their effect on individual firms. This issue arises because the only credible evidence regarding the impact of the overcharges on refiners consists of econometric estimates which measure indirectly the impact of the overcharges on the entire refining industry. Nevertheless, the states have argued in their consolidated brief that the referral order precludes OHA from utilizing evidence of that nature. The states maintain that OHA should require clear and convincing evidence of injury in order to find that any particular refiner bore some impact of the overcharges. This standard is advocated by the states because it would require a precise tracing of the impact of the overcharges—something which they believe cannot be done in a way that will yield economically valid information. If we were to accept the "heads I win—tails your lose" evidentiary conundrum posited by the states, we would have to conclude that it was impossible to determine who was injured by the overcharges. As explained below, we believe that the position espoused by the states is without merit.

Because of the operation of the Entitlements Program, the MDL 378 overcharges caused a small increase in the price of all crude oil refined in the United States. This general increase in crude oil costs raised market price levels for refined products by some amount. By measuring the amount of the crude oil cost increase caused by the overcharges that refiners were able to pass through in the form of product price increases, we can estimate the impact of the overcharges on the refining sector as a whole. By contrast, any attempt to

trace the impact of the overcharges through an individual refiner's operations would ignore the general increase in market prices for refined products caused by the overcharges, and therefore would not measure the amount of the overcharges which that refiner was able to pass through as market prices for products rose. In economic terms, tracing the overcharges through an individual refiner's operations would produce invalid results because of a failure to hold all other factors constant. "Holding all other factors constant" is a fundamental requirement of marginal economic analysis. Since this type of individualized "tracing" exercise would not yield any economically valid information, *see, e.g.*, Doc. No. 190, vol. I, sections III and V, it is disingenuous of the states to urge an evidentiary standard which would require it. Not only is an individualized tracing of the cost increases caused by the overcharges impossible, it is clearly not required in the present restitutionary context.

As a basic premise, restitution is never an exact science. *See S.O.S. Gasoline v. DOE*, Fed. Energy Guidelines (Court Decisions 1981-1984) ¶26,321 (D.D.C. 1981). The essential function of restitution is "to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation . . ." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d at 722. In complex antitrust cases involving the law of damages, with requirements considerably more exacting than those pertaining to restitution, the Supreme Court has consistently recognized that wrongs should not go unremedied simply because there is no mathematically precise measure of damages. For example, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), the Court stated: "it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." 282 U.S. at 563. In another vein, the Temporary Emergency Court of Appeals has noted that "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations . . ." *General Crude Oil Co. v. DOE*, 585 F.2d 508, 516 (Temp. Emer. Ct. App. 1978), *cert.*

denied, 440 U.S. 912 (1979), *quoting Amtel, Inc. v. FEA*, 536 F.2d 1378, 1383 (Temp. Emer. Ct. App. 1976), *quoting Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Since the government has a duty to ascertain those injured, and make refunds to them, with interest, from the restitutionary funds, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d at 723, it would be wrong to ignore that duty, simply because the present case does not lend itself to absolutely precise calculations. *See also Cities Service Co.*, 5 FEA ¶80,627 (1977); *Skelly Oil Co.*, 3 FEA ¶80,603 (1976). Based on the foregoing, we have determined that in cases such as the instant one, the use of approximations regarding the impact of the overcharges is not only permissible—it is clearly required.

Having explained why we must consider approximations in our fact-finding mission, we will now discuss the standard by which the evidence should be evaluated. All participants except the states have suggested that the OHA apply a preponderance of the evidence standard in determining who bore the impact of the overcharges and in what amounts. The states have urged that a clear and convincing evidence standard should be required. For the reasons set forth below, the standard by which we have judged whether a proponent of a particular theory met its burden of persuasion is the standard typically used in civil litigation—a preponderance of the evidence test.

To determine the evidentiary standard that should be used in this proceeding, we first look to whether the Congress has prescribed the degree of proof that must be adduced by a proponent of a factual finding to carry its burden of persuasion in this administrative proceeding. *See generally Steadman v. SEC*, 450 U.S. 91 (1981); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984). The parties have not cited us any such provision, and our review of the Emergency Petroleum Allocation Act of 1973 and the Economic Stabilization Act of 1970 does not disclose such a prescription in either of those statutes.

Where Congress has not mandated a standard of proof for an administrative proceeding, it is well settled that the judici-

ary is the traditional and most appropriate forum to prescribe the standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). Our review of decisions by the Temporary Emergency Court of Appeals has disclosed no case in which that court has established such a standard, and none has been cited by any of the parties. Accordingly, the inquiry next turns to the referral order of the District Court for guidance. Some participants in this proceeding argue that the District Court intended that the fact-finder apply a preponderance of the evidence standard, while others assert that the referral order imposes a higher standard. *Compare* Doc. No. 230 *with* Doc. No. 233. Certain parties insist that the court imposed a higher standrd because of its direction that the OHA fact-finding attempt to determine who bore the impact of the overcharges "with particularity." *E.g.*, Doc. No. 231. We believe that the referral order did not impose a higher standard and that the traditional preponderance of the evidence standard should be applied in this case.

The traditional standard of evidence utilized in a civil or administrative proceeding is proof by a preponderance of the evidence. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980). That standard must be applied unless the type of case and the sanctions or hardship imposed require a higher standard. *Woodby v. INS*, 385 U.S. 276 (1966). This is so because a standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983), *quoting Addington v. Texas*, 441 U.S. 418, 423 (1979). A preponderance of the evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. at 423. Any other standard, such as the one urged by the states, expresses a preference for one side's interests. Where particularly important individual interests or rights are at stake, the Supreme Court has required proof by clear and convincing evidence rather than by the preponderance of the evidence. *Herman & MacLean v. Huddleston*, 459 U.S. at 389. *See also Santosky v. Kramer*, 455 U.S. 745

(1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 1966) (deportation). However, nothing in the referral order leads us to conclude that this is the type of case that requires a more stringent burden of persuasion on the proponents of the competing theories than proof by a preponderance of the evidence.

In summary, we have determined that we must consider approximations regarding who bore the impact of the overcharges at issue in this proceeding and in what amounts. We will utilize a preponderance of the evidence test in evaluating the evidence presented by the parties and in determining whether the proponents of the many competing theories have met their burden of persuasion in the case.

— — — — — — — — — —

VIII. RECOMMENDATION OF RESTITUTIONARY MECHANISM

In its September 13 referral order, this court stated that it "will also welcome the views of the OHA on how restitution can best be achieved in this case. The Court, however, is retaining jurisdiction over both this action and the escrow fund. No determination of restitution nor payout from the escrow fund may be ordered by the OHA, as such matters remain within the province of this Court." Referral Decision at 596-97. The following sections present a restitutionary mechanism to implement the factual findings contained in this determination which we believe is administratively workable. The mechanism provides for the processing of refund applications filed by direct purchasers of MDL 378 crude oil, Entitlements Program participants, and consumers of refined petroleum products that purchased those products directly from refiners. These applications can be accepted promptly upon announcement of a payment proceeding. We recognize that this undertaking will require the dedication of significant resources. If directed by this court, the Office of Hearings and Appeals is ready to assist in this endeavor.

Unlike the fact-finding contained in this report, which is based upon the record compiled in this proceeding, the recommended restitutionary mechanism reflects DOE policy. Accordingly, it is the intention of the OHA to follow similar procedures in distributing crude oil moneys which are subject to Subpart V special refund proceedings. 10 C.F.R. Part 205, Subpart V.

A. Direct Purchasers

Direct purchasers of the crude oil subject to this proceeding who claim injury due to undercompensation by the Entitlements Program should be permitted to file refund applications. Each application should include the following information for each crude oil property from which the applicant requests a refund:

1. A schedule showing on a monthly basis the number of barrels purchased, the price actually paid per barrel, the lawful tier level or levels for that crude oil, and the lawful ceiling price for each of those tiers;

2. Copies of published postings which indicate the market price levels for the crude oil involved;

3. All facts known to the applicant relating to deposits into the escrow account as a result of the miscertifications involved;

4. A schedule showing, on a monthly basis, aggregate banks of unrecouped cost increases calculated pursuant to the DOE regulations; and

5. The name, address, and telephone number of a person who may be contacted if further information is necessary for processing the refund application.

These applications should be analyzed on a case-by-case basis to determine whether the individual applicants actually were injured by the amount of the undercompensation. Substantial concerns have been raised in this area. For example, it has been suggested that some of the MDL 378 transactions reported by direct purchasers may not have occurred at arm's length, and that other forms of compensation were received

that obviated any apparent injury. *See* Tr. at 41-45, 56, 64-65, 116-17.

In addition, no claimant should receive a refund unless it demonstrates that it paid the correct amount into escrow. Counsel for the group of refiners denominated Arco et al. in this proceeding indicated at oral argument that he believes that firms who are parties to this litigation should not receive refunds unless they show that they have deposited the proper amount into the escrow account:

> [Q]: In the contest of a refund claims process should a claimant who is a producer refiner be required to demonstrate that it has deposited all of the funds it should have into escrow prior to getting any refund?
>
> MR. KENNEDY: Certainly. I can't imagine that one would be unwilling to do so but I don't think there is any question but [that] sooner or later, that all of the funds that arose because of the overcharge will be in escrow.

Transcript of October 30, 1984 Oral Argument at 95-96. We agree. Each refund claimant should be required to demonstrate that it has deposited all of the funds it should have into escrow before it is eligible to receive a refund.

B. Refiners

Refiners should also be permitted to file refund applications. The portion of the escrowed funds not paid to direct purchasers should be deemed to have been passed on to participants in the Entitlements Program. Of that amount, four percent should be set aside in a pool to satisfy claims from refiners.

The pool set aside to satisfy claims from refiners should be used first to fund unsatisfied entitlements exception orders, and the remainder should be distributed pro rata to refiners. *See* 50 Fed. Reg. 1919 (1985). The payment of outstanding unsatisfied exception relief orders is an important feature of the restitutionary mechanism which the OHA is recommending to this court, and it merits further explanation.

Exception relief was intended to mitigate adverse effects of the DOE regulations suffered by individual firms where the application of those regulations to the particular circumstances of the firm resulted in a "special hardship, inequity or unfair distribution of burdens." Department of Energy Organization Act, 42 U.S.C. §7194(a) (1982). In many instances, exception relief was effectuated by orders reducing a firm's obligation to buy entitlements or permitting it to sell entitlements to the extent necessary to alleviate the hardship caused by the DOE regulations. These orders were often based upon projected financial results, and if a later review revealed a firm had received more or less than the relief necessary to offset the hardship, an order was issued requiring the firm to purchase or sell additional entitlements.

On January 28, 1981, the President eliminated federal regulation of crude oil and petroleum products. Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981). At the time of decontrol, a number of entitlements exception orders were outstanding, and the OHA continued to issue entitlements exception orders after decontrol. On June 28, 1984, the ERA issued a final decision not to publish any further entitlements lists. 49 Fed. Reg. 27410 (1984). Accordingly, the question remained as to whether and how to effectuate entitlements exception orders.

On January 9, 1985, the Administrator of the DOE's Economic Regulatory Administration (ERA), exercising authority delegated to him by the Secretary of Energy, announced a final decision concerning the Department's policy on entitlements exception orders (the January 9 notice). 50 Fed. Reg. 1919 (1985). The January 9 notice stated the Department's policy that: "if OHA determines refiners as a class were injured by violations or alleged violations of the EPAA regulations, then OHA should fund receive orders from that portion of refund money which corresponds to the injury sustained by refiners as a class." 50 Fed. Reg. at 1921 (footnote omitted). The notice explained the reason for this policy as follows:

> Receive orders resulted from individual adjudica-

tions which held that the EPAA regulations imposed special hardship on individual firms during the period of controls. Section 504 of the DOE Act imposes an obligation on DOE to provide adjustments to the EPAA regulations as necessary to prevent such hardship. Even though the EPAA regulations, including the Entitlements Program, have terminated, DOE believes fairness requires an attempt to use another means of granting relief to firms with adjudicated hardship.

In the event that OHA, based on evidence presented to it, determines that a portion of refund money corresponds to the inury sustained by refiners as a class, existing exception and remedial authority will enable it to carry out the policy decision announced in this Notice and fund receive orders from that portion of refund money. Invoking OHA's exception and remedial authority to distribute refund money to firms with receive orders would further the purposes of the EPAA since the money would be targeted to firms which received an adjudication that they suffered special hardship under the regulations. Such a distribution would remove any remnants of this hardship to individual firms caused by EPAA regulations. In particular, the policy decision set forth in this Notice is of special significance to small and independent refiners because over three-fourths of the amount of relief provided in all the specific adjudications resulting in receive orders is directed to small and independent refiners. In this respect, this policy decision furthers the statutory objectives of the EPAA, because small and independent refiners are a class specified in that statute for special protection.

Use of this refund money would be entirely consistent with the effects of receive orders issued during the period of the period of controls and the operation of the Entitlements Program. During that time refiners as a class funded receive orders because the Entitlements relief directed to recipients of exception orders simply increased pro rata the burden borne by all refiners in the

> Entitlements Program. Under the policy decision announced in this Notice refiners as a class again will, in effect, fund receive orders from the refund money associated with overcharges actually borne by refiners as a class.

50 Fed. Reg. at 1921-22 (footnote omitted). Under this policy, the moneys available to refiners should be used first to satisfy outstanding orders adjudicating requests for exception relief which resulted in a firm being permitted to sell additional entitlements.

Funds remaining after all such orders are paid should be distributed to all refiners on a pro rata basis. The pro rata share of runs to stills of each refiner could be calculated for the entire existence of the Entitlements Program, i.e., for the period November 1974 through January 1981. However, because 82 percent of the MDL 378 overcharges occurred during the period 1978 through 1980, Doc. No. 190, at 200, a better method of restitution would utilize this information for the years 1978, 1979, and 1980. A refiner-participant would file data showing its monthly runs to stills as reported to the Entitlements Program and calculate its pro rata share of the program. In addition, it would need to file information showing that it maintained "banks" under the refiner price rule in excess of the claimed refund. A showing of cost banks would be sufficient at this point in the refund process because the initial finding of injury to refiners as a class has already been made, and we need look no further. Payment could then be made promptly.

A number of Entitlements Program participants were firms other than petroleum refiners. For those participants, including public utilities, municipalities, and cooperatives, passthrough questions are not relevant. Unlike refiner-participants, these Entitlements Program participants generally operate in a manner designed to passthrough the benefits associated with any refund to their customers or constituents. For public utilities, the increase in crude oil costs, and decrease in residual fuel oil based entitlements benefits, associated with

the dispersal of the impact of MDL 378 overcharges through the Entitlements Program was passed on to customers, either in rate bases or through fuel adjustment clauses. *See, e.g.*, Doc. No. 199. These firms should be granted full refunds provided they demonstrate that the refund will be passed on to their customers. Municipalities who participated in the Entitlements Program should receive refunds without any further showing. Farmer cooperatives which participated in the Entitlements Program should receive refunds based upon their pro rata share of runs to stills times the percentage of product sold to members. As we have stated in Subpart V refund proceedings, in general,

> under the by-laws and contractual agreements that control the financial practices of coops, any overcharges would have been channeled to their customers, who for the most part are its member-owners. Similarly, any refund would be passed on to the current member-owners of the coop. In effect, we have treated refund applications by coops as applications made on behalf of their customers.

Standard Oil Company (Indiana)/Farmland Industries, Inc., 12 DOE ¶85,153 at 88,472 (1984).

C. Purchasers of Petroleum Products

Finally, there are three classes of individuals and firms who also were affected by the MDL 378 overcharges. There are (1) resellers of petroleum products, (2) consumers of petroleum products who purchased product from a reseller, and (3) consumers who purchased product from a refiner. With respect to resellers, we propose to hold an additional hearing at which time members of that class can demonstrate that they were injured. That hearing will also concern the impact absorbed by consumers who purchased product from a reseller. We have purposely not convened that hearing until after the issuance of this determination.

For consumers of petroleum products who purchased directly from a refiner, including airlines, public utilities, the

federal government, and other large purchasers that used petroleum products in their businesses, the finding in this determination that refiners absorbed four percent of the impact of the MDL 378 overcharges means that the rest of the MDL 378 overcharges were passed through, and those consumers absorbed the remainder, or 96 percent of that impact. Consequently, any refund mechanism adopted as a result of this fact-finding should permit consumers that purchased directly from refiners to file refund claims immediately.

We believe that the following methodology for paying claims by those consumers is workable. First, a volumetric refund amount should be determined. According to information supplied to us by the Energy Information Administration, during the period of federal controls on crude oil Americans consumed 2,020,997,335,000 gallons of refined petroleum products. 48 Fed. Reg. 57608 (1983). Of that amount, 834,197,280,000 gallons were consumed during the years 1978, 1979, and 1980. The per gallon amount should be calculated by dividing 96 percent of the amount available for distribution by the number of gallons of refined petroleum products sold during those three years. As noted previously, the record indicates that 82 percent of the MDL 378 overcharges occurred during the period 1978 through 1980. Doc. No. 190, at 200. Thus, the use of these three years, as opposed to the entire period, would more accurately distribute the funds to those who were injured. It would also be efficient and administratively workable since it would obviate the need to document purchases made more than seven years ago and expedite the analysis of claims. For example, if $900 million were available for distribution after direct purchasers were paid, this formula would yield a per gallon refund amount of approximately one-tenth of a cent. Consumers that file refund claims would need to demonstrate only the total amount of purchases made directly from a refiner during the three-year period 1978 through 1980. Refunds could be calculated simply by multiplying qualifying purchases by $0.001.

Information available to us indicates that under this restitutionary method consumers should receive substantial

refunds. For example, the Air Transport Association of America has indicated that scheduled airlines purchased 33,445,674,000 gallons of kerosene-based jet fuel during the years 1978, 1979, and 1980. Doc. No. 193, at Exh. No. 1. If this restitutionary approach is approved, and the preliminary information supplied by the ATA proves accurate, scheduled airlines should receive refunds from the escrowed MDL 378 overcharges of approximately $33.5 million. Similarly, public utilities purchased approximately 66,332,700,000 gallons of product during the 1978-80 period. EIA, October 1984 Monthly Energy Review at 77 (January 1985). This level of purchases would entitle the utilities to refunds totalling $66.3 million, provided the utilities agree to refund the money to their customers through fuel adjustment clauses.

D. Summary of Recommended Refund Process

In summary, if this court approves this report, refund applications can be accepted from direct purchasers of the MDL 378 crude oil, participants in the Crude Oil Entitlements Program, and consumers that purchased product directly from refiners.

Applications from direct purchasers of the MDL 378 crude oil should be carefully analyzed on a case-by-case basis. Refunds should be granted based upon the difference between the price actually paid and the sum of the lawful ceiling price and the value of an entitlement for that month, times the volume of oil involved, provided that the applicant is able to show it was actually injured by that amount. Prior to receiving a refund, each direct purchaser should be required to demonstrate that it deposited the proper amount into the MDL 378 escrow account.

Refund applications from refiners and consumers who purchased refined petroleum products directly from those firms can also be processed at this time. Refunds to refiners cannot be automatic; the filing of refund applications should be required for several reasons. First, a number of those firms have ceased operations, and an application process would resolve conflicts about the identity of those persons eligible to

receive refunds. Second, a refiner-participant should receive a refund only to the extent it has banks of unrecouped increased costs calculated pursuant to the refiner price rule in excess of the requested refund. A schedule of those banks should be required in any such application. Finally, as noted above, funds available to satisfy these claims should be used first to satisfy any unfunded final entitlements exception orders which would have permitted the firm to sell additional entitlements. A refund application process would allow valid claims of this type to be paid first. Entitlements Program participants who were not refiners are a special case, and they should receive their full pro rata share of the amount of the overcharges passed through to the Entitlements Program.

Refund applications from consumers that purchased refined petroleum products directly from refiners should also be processed. A refund application should include a schedule of purchases during the period January 1, 1978 through December 31, 1980, and an indication from which refiners those purchases were made. It should also include a statement signed by the chief executive officer of the firm verifying that those purchases were made directly from a refiner. Refunds should be distributed based upon a volumetric amount calculated by dividing the amount in this pool by 834,197,280,000. However, in certain circumstances contractual arrangements basing product prices on entitlements benefits could indicate that a refiner or its customer absorbed all of the impact of the MDL 378 overcharges, and in that situation the refiner or the customer should receive an additional amount. The refund process can move forward immediately upon judicial approval, and refund applications can be paid on a partial basis until a final accounting of the escrow account is made.

— — — — — — — — — —

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff	:	CIVIL ACTION NO. 78-1035
EXXON CORPORATION, Defendant	:	
GERALDINE H. SWEENEY Individually and on behalf of all others similarly situated	:	
and	:	
RJG CAB, INC. Individually and on behalf of all others similarly situated	:	
and	:	
NATIONAL FREIGHT, INC. Individually and on behalf of all others similarly situated Plaintiff-Intervenors	:	

MEMORANDUM IN SUPPORT OF MOTION FOR INTERVENTION FOR THE PURPOSE OF APPEAL

I. No Other Party In This Proceeding Will Argue The Petitioner's Position, Nor Any Position Affecting Restitution To The Transportation Users Of More Than Fifty Percent Of Oil Production In The United States; Accordingly, Intervention Is Properly Granted For Purposes Of Appeal

Petitioners believe their participation in the appeal is necessary since only they will argue the position that:

(i) This Honorable Court was correct in finding that the overcharge injury was to ultimate consumers and that the overcharge funds should be returned to them;

(ii) This Honorable Court was also correct in its finding that, as to the injury to such transportation users, it is administratively impracticable to attempt to entertain specific claims based upon specific overcharges to identified customers during the overcharge period;

(iii) This Honorable Court was incorrect however in concluding that the proper remedy was an award of the fund to the States for the purpose of five specific federal programs, none of which benefit users of gasoline and diesel fuel in transportation vehicles; to the contrary, pursuant to the Court's judgment most of the restitution fund will be spent to benefit the limited class of poor persons in connection with heating bills;

(iv) Instead, far more appropriate means are available to return the transportation oil overcharges to the class of those injured, including, inter alia, such measures as reduction of motor vehicle license fees, reduction of motor fuel taxes, and additional expenditures for improvement of roads and bridges.

Inasmuch, therefore, as only these petitioners, will argue the position set forth above, nor indeed any position assuring restitution to the transportation users overcharged by virtue of defendant's actions, it is respectfully requested that they be permitted to intervene.

— — — — — — — — — —